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Judicial Funding and Taxation Mandates: Will *Missouri v. Jenkins* Survive Under the New Federalism Restraints?

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The judiciary frequently mandates costly institutional reforms to correct state and local governmental constitutional violations. This Article examines the unprecedented equitable power exercised by a federal district court in its oversight of a school desegregation remedial plan in Kansas City, Missouri at a cost exceeding $1.8 billion. The district court ordered taxation to ensure funding for the remedial plan and directed local authorities to disregard state law limitations that barred such taxation.

Dean Griffith criticizes the judiciary's disregard of remedial plan costs in devising institutional reforms. She proposes that courts apply a balancing test in the remedial process—weighing both governmental interests, including fiscal constraints, and the need to remedy constitutional violations. The judiciary should evaluate the effectiveness of a proposed remedy as well. The mandated expenditures in the Jenkins *litigation failed to improve test scores appreciably or to improve the district's racial balance by attracting a significant number of white students.*

Challenging the assumption that federalism restraints do not apply to the judiciary's remedial powers, Dean Griffith argues that the Constitution's federal structure, separation of powers principles, comity precepts, and the Guarantee Clause limit judicial power to some extent. She points out that the Supreme Court's 1990 Missouri v. Jenkins *decision upholding the district court's taxation orders lacks consistency with the Court's recent federalism rulings that have invalidated congressional acts viewed as excessively interfering with the operation of state governmental functions. Viewing judicial taxation orders as deeply intrusive upon state government and administration, Dean Griffith argues that such taxation should be foreclosed except when tax structure deficiencies cause constitutional violations to be plainly remediless. She rejects court-ordered taxation that is not authorized by state law as involving the judiciary in law making, a legislative function.*

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INTRODUCTION

This Article examines the implications of the United States Supreme Court's 1990 decision in *Missouri v. Jenkins*,[1] in which the Court sanctioned the federal judiciary's exercise of new and unprecedented equitable powers to provide funding for court-mandated public school desegregation plans in the Kansas City, Missouri School District (KCMSD). The Court affirmed that a district court may order a school district to levy taxes to increase school desegregation funding; further, a district court may enjoin the enforcement of state law limitations that prevent such taxation.[2]

The *Jenkins* litigation presents three important legal issues. First, *Jenkins* raises questions as to the extent of the federal judiciary's remedial powers that reallocate fiscal resources and the purposes that may be served by court-instituted remedial processes. In *Jenkins*, the district court ordered quality-improvement educational programs—the scope of which exceeded national norms. These programs were initiated to improve the educational opportunities of children adversely affected by past racial segregation and to increase the number of white students attending the KCMSD schools. The district court sought to achieve a better racial balance in the KCMSD schools by encouraging the voluntary enrollment of white students living in surrounding suburban areas through the provision of court-ordered distinctive, quality educational programs and enhanced capital improvements. Although the Court did not review the cost and scope of the district court's remedial program in its 1990 *Jenkins* decision, it upheld the district court's taxation orders to ensure funding for these court-ordered

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[1] 495 U.S. 33 (1990). Numerous articles in law reviews and journals have explored the issues raised by *Missouri v. Jenkins*. *See, e.g.*, Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 758–64 (1992). *See generally* D. Bruce La Pierre, *Enforcement of Judgments Against States and Local Governments: Judicial Control Over the Power to Tax*, 61 GEO. WASH. L. REV. 299 (1993); John Clayton Thomas & Dan H. Hoxworth, *The Limits of Judicial Desegregation Remedies After* Missouri v. Jenkins, 21 PUBLIUS: THE JOURNAL OF FEDERALISM, Summer 1991, at 93; Stanley J. Andersen, Note, *Judicially Imposed Taxation and Desegregation:* Missouri v. Jenkins, 24 CREIGHTON L. REV. 289 (1990); Douglas J. Brocker, Note, *Taxation Without Representation: The Judicial Usurpation of the Power to Tax in* Missouri v. Jenkins, 69 N.C. L. REV. 741 (1991); JoAnn Grozuczak Goedert, Comment, Jenkins v. Missouri*: The Future of Interdistrict School Desegregation*, 76 GEO. L.J. 1867 (1988); Christopher W. Nelson, Comment, Missouri v. Jenkins*: Judicial Taxation and the Funding of School Desegregation*, 26 NEW ENG. L. REV. 529 (1991); Karl Tage Olson, Note, 41 DRAKE L. REV. 223 (1992); Thomas J. Walsh, Note, *"No Taxation Without Representation... Unless Desegregation:" The Power of Federal Courts to Order Tax Increases to Desegregate Schools:* Missouri v. Jenkins, 12 HAMLINE J. PUB. L. & POL'Y 191 (1991); Randall H. Warner, Note, *Taxation and Desegregation: Pushing the Limits of Federal Courts' Remedial Powers*, 33 ARIZ. L. REV. 1007 (1991); G.R. Wolohojian, Note, *Judicial Taxation in Desegregation Cases*, 89 COLUM. L. REV. 332 (1989).

[2] *See Missouri v. Jenkins*, 495 U.S. at 51.

remedies.[3]

The federal judiciary's purse string control of state and local governments' expenditures raises separation of power and federalism issues irrespective of the worthy causes served by such funding. District courts' orders frequently intrude into state and local policy-decision making by specifying the types of educational remedial programs that must be undertaken and the amount of funding required.[4] The district court's aggressive remedial plan in *Jenkins*, at a cost of over one billion dollars, for example, attracted widespread media attention and created controversy.[5]

Second, *Jenkins* sanctioned the power of taxation as a remedial tool. Although the Court has affirmed extensive fiscal remedies in many areas of institutional reform litigation, *Jenkins* is the first United States Supreme Court decision upholding a district court's authority to order additional taxation to fund remedial educational programs at the level deemed necessary by the district court to correct past racial segregation. The district court's order in *Jenkins* deeply intruded upon state autonomy and engulfed the court in a legislative role.

Third, *Jenkins* approved the power of a district court to overturn state law that

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[3] Five years later the Court granted certiorari to consider the district court's exercise of equitable power to order salary increases for both instructional and noninstructional staff. In the course of the opinion, the majority held that the district court's pursuit of a metropolitan, interdistrict remedy, designed to improve the desegregative attractiveness of the KCMSD, exceeded the court's equitable powers because only intradistrict constitutional violations occurred. *See* Missouri v. Jenkins, 515 U.S. 70, 94 (1995).

[4] Litigation to reform state and local governmental institutions is not limited to school desegregation, but extends to other types of broad class actions against governmental entities. The purpose of this litigation is to effectuate social, economic, and political reform. *See* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1122 n.6 (1996). For a discussion of public structural reform litigation, see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978).

[5] *See, e.g.*, Charles-Edward Anderson, *Curing Segregation: Parents Sue for Kid's Private Education at Public Expense*, 75 A.B.A. J., Nov. 1989, at 22; Opinion Editorial, *Can Courts Order Tax Increases?*, WASH. POST, Oct. 31, 1989, at A22; William Celis, III, *Kansas City's Widely Debated Desegregation Experiment Reaches the Supreme Court*, N.Y. TIMES, Jan. 11, 1995, at B7; William H. Freivogel, *Jewels Shine Amid Failures in Kansas City*, ST. LOUIS POST-DISPATCH, May 16, 1994, at B5; Lynn Horsley, *Energy and Enthusiasm Turned to Detachment and Displeasure*, KAN. CITY STAR, Feb. 4, 1995, at A13; Blake Hurst, *Supreme Court Looks Again at Missouri's Runaway Judge*, WALL ST. J., Apr. 26, 1995, at A15; William Robbins, *Judge Is Calm in Eye of Storm He Helped Create*, N.Y. TIMES, Oct. 20, 1989, at B24; William Robbins, *Kansas City Tries to Revive School, But the Cost Is Criticized*, N.Y. TIMES, Oct. 10, 1989, at A25; *The MacNeil/Lehrer NewsHour, Taxing Lesson, Capitol Games* (EBC & GWETA television broadcast, transcript #3591, Oct. 30, 1989).

would have barred the court-ordered taxation. The district court specifically enjoined a tax levy rollback required by Missouri law. By this action, the district court displaced a valid state law limitation to facilitate the funding of its remedial desegregation plan. *Jenkins* thus upheld a district court's power to order taxation for which no state legislative authority existed. This ruling sanctions the power of a district court to authorize taxation, a power that historically has been the province of the legislature.

Following the introduction of this Article, Part I begins by examining significant United States Supreme Court decisions that expanded the scope of the federal judiciary's equitable powers to desegregate public schools. The *Missouri v. Jenkins* litigation commenced in the 1980s—at a time when district courts were instituting quality-educational improvement programs in lieu of relying exclusively upon mandatory pupil assignments to remedy unconstitutional school segregation. Such mandated improvements greatly enlarged the district courts' fiscal remedial power because these improvements were more expensive than busing. Part I presents the background of the *Jenkins* litigation and explores the far reaching remedial programs ordered by the District Court Judge Russell G. Clark. Part II then examines the historical precedent leading to the federal judiciary's willingness to order taxation to further expand its array of fiscal remedial tools. The *Jenkins* opinions upholding judicial taxation in both the lower courts and in the United States Supreme Court are examined and critiqued.

Part III analyzes the existing legal framework of the federal judiciary's fiscal remedial powers once it has determined that public expenditures are necessary to correct a constitutional violation. To guide the exercise of its fiscal remedial powers, the Court has emphasized that (1) the cost of a remedy does not impede its use, (2) state law limitations do not preclude the imposition of remedial measures, and (3) remedial oversight should not be overly intrusive. The Court's application of these principles in both school desegregation and Eighth Amendment prison litigation are compared and contrasted. Acknowledging respect for comity and federalism concerns, federal courts frequently caution against the implementation of overly intrusive remedies in institutional litigation involving unconstitutional prison conditions. In devising school desegregation remedies, however, federal courts show less concern for federalism restraints. In contrast to the federal judiciary's remedial principles, Part IV presents the approaches taken by state court judges when fiscal remedial measures are deemed necessary to correct constitutional violations.

This Article argues that *Jenkins* is inconsistent with the United States Supreme Court's recent federalism rulings, the Constitution's structural framework of separated powers, comity principles, and the Constitution's Guarantee Clause. Recent Supreme Court decisions[6] stress the constitutional

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[6] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

limitations the federal structure imposes upon Congress's delegated power to direct the states to carry out its policy choices. Part V specifically explores whether structural limitations inherent in the Constitution's framework restrain the Supreme Court and the federal judiciary from imposing judicial remedies that severely strain a state or local government's financial resources. This Part also examines whether separation of powers limitations emanating from the Constitution's structure as well as comity principles restrict the federal judiciary's expansive use of equitable powers. The Constitution's Guarantee Clause arguably also limits the power of the judiciary to order remedial measures that abrogate valid state and local laws found nonetheless to affect the remedial process. When district courts order local authorities to tax without state authorization and in violation of constitutionally valid state expenditure and taxation limitations, they abridge the exercise of the guaranteed republican form of government at the state and local level.[7]

Part VI presents different methodologies to guide the exercise of the federal judiciary's equitable power. Prior to the imposition of remedial measures that make resource allocation decisions for state and local governments, the federal judiciary should engage in interest balancing, giving consideration to the interests of state and local governments, as well as to the rights of the victims of the constitutional violations. This Article advocates that a balancing test, weighing both the need to protect civil rights and to free governments from overly intrusive remedial actions, should guide the imposition of remedial measures in institutional reform litigation. The federal judiciary's present reliance upon categorical remedial principles, which often conflict with each other, is criticized.

The Court's decision in *Milliken v. Bradley* (*Milliken II*)[8] supports this Article's recommended balancing approach to remedial measures. *Milliken II*'s three-part test considered (1) the nature and extent of the constitutional violation, (2) the need to restore the victims of discriminatory conduct to the position they would have occupied absent such discrimination, and (3) the interests of state and local authorities in managing their own affairs. This Article proposes a test that expands *Milliken II*'s rule number three to include consideration of the extent to which the proposed remedial actions intrude upon state and local administration of governmental affairs. The proposed test provides for consideration of the following factors: (1) the cost of the proposed remedial actions, (2) the ability of state and local resources to fund the proposed remedial actions, (3) the extent to which the remedial actions will violate valid state and local laws, and (4) the

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[7] The inherent conflict between individual liberty and republicanism, while recognized at the founding of the American republic in 1776, was viewed as reconcilable due to the emphasis upon the collective well being of the people rather than upon a minority of individuals. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 61–65 (1969). Most Americans in 1776 recognized that virtue—viewed as the willingness to sacrifice private desires for the good of the state—constituted the lifeblood of the republic. *See id.* at 68–69.

[8] 433 U.S. 267 (1977).

extent to which the remedial actions will require the judiciary to displace state and local managerial prerogatives and decision-making processes, including representative rule. These considerations should be balanced against the rights maximizing approach taken in *Milliken II*'s first two rules. The accommodation of the rules with each other will facilitate a more balanced remedial approach in which all rules receive consideration.

Part VII critiques the various principles relied upon by different federal courts for determining the conditions upon which judicial taxation may be ordered to correct constitutional violations. It examines whether the principles established in *Jenkins* to guide the federal judiciary in the imposition of state and local taxes to correct constitutional violations adequately serve as federalism postulates. The *Jenkins* Court ruled that district courts possess remedial power to order taxation upon making a finding that no other alternatives are available to fund a school desegregation remedial plan. Since the amount of funding necessary to fund a school desegregation plan, or another institutional remedy, cannot be determined with precision, this Article suggests that other alternatives, involving a less costly remedial plan, can be devised to defeat the application of the test. This Article concludes that the no alternative test is unworkable because it permits the judiciary to make subjective decisions as to when court-ordered taxation is appropriate.

Unless overruled, *Jenkins* may be relied upon in the future to support judicially created and authorized taxation that overrides state law limitations. Part VIII proposes guidelines to ensure that district courts do not use their equitable powers to order taxation without careful consideration of alternative remedial choices. After examining the loss of legitimacy that the judiciary will suffer by performing state and local legislative functions, this Article asserts that court-ordered taxation for which no authority exists under state law intrudes so deeply upon the operations of state and local government as to violate comity and federalism principles designed to prevent the judiciary from usurping legislative functions. When state authority exists for the imposition of taxes, this Article concludes that judicially ordered remedial taxation cannot be completely foreclosed, but should be ordered only upon a judicial finding that (1) alternative sources of funding have been sought and repeatedly denied and (2) deficiencies of the existing tax rate and method of taxation cause the constitutional violations to be plainly remediless. The district court remedial process should analyze at the outset the existing tax structure and scope of fiscal remedies needed to correct the constitutional violation. Once the court understands the existing resources available to correct the constitutional violation, it can more readily determine the amount of additional revenue required as well as possible alternative funding resources.

The State of Missouri continued to challenge the district court's remedial orders following the United States Supreme Court's 1990 *Jenkins* decision. In a subsequent 1995 ruling, the Supreme Court held that the district court's goal of

inducing the enrollment of white students in KCMSD schools through expansive programmatic and facilities improvements exceeded its remedial authority.[9] This ruling, while limiting the purposes for which remedial educational programs can be imposed, does not change the Court's earlier approval of court-ordered taxation. The Court's failure to articulate a coherent doctrine that recognizes the existence of federalism restraints upon the federal judiciary, as well as upon the Congress, continues into the new millennium.

Implementing court-ordered public school desegregation plans proved more difficult than originally foreseen at the time of the 1954 *Brown v. Board of Education* (*Brown I*)[10] decision. Given the importance of ending racial discrimination in the provision of public education, the federal judiciary greatly expanded the scope of its equitable powers, hoping that far reaching, mandated institutional reforms would end segregation. At the millennium, greater realization exists that the patterns of racial discrimination, which affect the quality of education provided in our public schools, cannot be solved by the judiciary alone. During the time of the *Jenkins* litigation in the late 1970s and 1980s, people believed that the implementation of expansive quality improvement programs would produce equal education for inner-city minority children in a short period of time.[11] Although children in the KCMSD received the benefits of increased educational funding as a result of this litigation, the expensive remedial program failed to produce greater racial balance in the school district.[12]

The federal judiciary's enlargement of its equitable powers must be examined in the context of the Constitution's structure of separated powers as well as from a school desegregation perspective. The judicially authorized taxation and disregard of valid state law limitations endorsed by *Jenkins* to fulfill *Brown I*'s promise created precedent that the federal judiciary stands ready to use in areas other than school desegregation.[13] Whereas some limitations exist upon Congress's fiscal powers to mandate local institutional changes, the federal courts often consider themselves removed from the Constitution's federalism restraints. Therein lies the significance of *Jenkins* and its progeny.

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[9] The Court held that the district court's remedial order of salary increases for both teachers and noninstructional staff to fulfill its "desegregative attractiveness" goal was too far removed from remedying the vestiges of Missouri's previously mandated racial segregation. *See* Missouri v. Jenkins, 515 U.S. 70, 100 (1995).

[10] 347 U.S. 483 (1954).

[11] *See* Gary Orfield, *Forward* to JOSEPH FELDMAN ET AL., THE HARVARD PROJECT ON SCHOOL DESEGREGATION, STILL SEPARATE, STILL UNEQUAL: THE LIMITS OF *MILLIKEN II*'S EDUCATIONAL COMPENSATION REMEDIES 3 (1994).

[12] *See infra* notes 201–05 and accompanying text.

[13] *See infra* note 223 and accompanying text.

I. HISTORICAL DEVELOPMENTS LEADING TO COURT MANDATED FUNDING TO IMPLEMENT SCHOOL DESEGREGATION

A. *Early Significant Supreme Court Decisions That Implemented School Desegregation*

1. Brown v. Board of Education

In *Brown v. Board of Education* (*Brown I*), the United States Supreme Court held that segregation of public school children on the basis of race violated the Fourteenth Amendment[14] of the United States Constitution because it deprived minority children of equal educational opportunities.[15] Studies confirmed that expenditures for the education of white children greatly exceeded those for African-American pupils.[16] Overturning *Plessy v. Ferguson*'s[17] "separate but equal" doctrine, in the context of educational facilities, the Court opined that separating African-American children from white children on the basis of race generated feelings of inferiority in the former.[18] *Brown I* did not specify how segregation would be remedied, but in *Brown v. Board of Education* (*Brown II*),[19] the Supreme Court stated that courts would be guided by equitable principles in fashioning desegregation decrees.[20] Further, the primary responsibility for effectuating desegregation was placed upon local school boards.[21] A finite time

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[14] *See* U.S. CONST. amend. XIV; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 82 (1980) (stating that the Fourteenth Amendment embodies the ideal that minority interests must be represented in our republican government).

[15] *See Brown I*, 347 U.S. at 493. For a discussion of how the ground work was laid for this lawsuit, see JIM HASKINS, SEPARATE BUT NOT EQUAL: THE DREAM AND THE STRUGGLE 82–93 (1998). Five key cases were initiated originally in Washington, D.C. and in localities in the States of South Carolina (Clarendon County), Kansas (Topeka), Delaware (Claymont), and Virginia (Prince Edward County). *See id.* at 94–127. Subsequently, the United States Supreme Court consolidated the four state cases and separated out the Washington, D.C. case as involving a federal district. *See id.* at 127.

[16] In the 1920s, the NAACP conducted studies of school expenditures for white and black students in several southern states. *See* HASKINS, *supra* note 15, at 82. The ratio in Georgia was eight to one; in Mississippi, five to one; in North Carolina, two to one. *See id.* at 82–83.

[17] 163 U.S. 537 (1896).

[18] *See Brown I*, 347 U.S. at 494. Dr. Kenneth B. Clark, a black psychologist, testified in the Delaware and South Carolina cases, consolidated in *Brown I*, that school segregation impaired black children's self-esteem by producing feelings of inferiority. *See* HASKINS, *supra* note 15, at 115. To measure self-esteem, Dr. Clark conducted doll tests that evidenced African-American children's preference for white dolls over brown dolls. *See id.* at 101.

[19] 349 U.S. 294 (1955).

[20] *See id.* at 300.

[21] *See id.* at 299.

period to implement desegregation was not set; instead, district courts were directed to oversee the desegregation process "with all deliberate speed."[22]

2. *The Supreme Court's Response to Public Resistance to School Desegregation*

Brown I ushered in an era of widespread resistance to immediate desegregation in the South.[23] For example, the Governor of Arkansas, Orville Faubus, ordered the state National Guard to block the entry of African-American students to Central High School in Little Rock. In response, President Eisenhower ordered federal troops to ensure their admittance.[24]

Some southern school districts completely closed their schools to avoid compliance with *Brown I*.[25] In *Griffin v. County School Board*,[26] the Court ruled

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[22] *Id.* at 301.

[23] *See* J. HARVIE WILKINSON, III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 43, 51–52, 65, 71–74, 82 (1979). Southern school desegregation after *Brown I* has been characterized as moving through four stages: (1) absolute defiance from 1955 to 1959, (2) token compliance from 1959 until passage of the 1964 Civil Rights Act, (3) modest integration from 1964 to 1968 to avoid the cutoff of federal funding, and (4) massive integration beginning with the Court's decision in *Green v. County School Board*, 391 U.S. 430 (1968). *See id.* at 78.

New York Senator Daniel Patrick Moynihan noted that the Court's order in *Brown I* was not obeyed for the next 16 years, but by the fall of 1970, the dual school system in the southern states had disappeared as a result of the appropriation of federal funds to aid desegregation. *See To Authorize Special Assistance for Desegregation Activities: Hearings on S. 1256 Before the Subcomm. on Educ., Arts & Humanities of the Senate Comm. on Labor & Human Resources*, 98th Congress 7–9 (1983) (statement of Sen. Daniel Patrick Moynihan (D-NY) on S. 1256, The Emergency School Aid Act). *See generally* Robert B. McKay, *"With All Deliberate Speed:" A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956); L.A. Powe, Jr., *The Road to* Swann*: Mobile County Crawls to the Bus*, 51 TEX. L. REV. 505 (1973).

[24] For a description of the terror and harassment experienced by the black students who attended the formerly white Central High School in Little Rock, Arkansas in 1957, see HASKINS, *supra* note 15, at 148–50. For a short description of the life experiences of the nine black students who first integrated Central High School, see *id.* at 166–67.

Opposition to integration was not confined to the South. On the first day of school in New York City in September, 1965, black students bused from Brownsville to Bay Ridge were met by an egg throwing mob who called them "niggers." *See* CLARENCE TAYLOR, KNOCKING AT OUR OWN DOOR: MILTON A. GALAMISON AND THE STRUGGLE TO INTEGRATE NEW YORK CITY SCHOOLS 181 (1997).

[25] Many southern states resisted compliance with *Brown I* by school closing and fund-cutoff laws. *See* WILKINSON, *supra* note 23, at 82–83. Virginia adopted the most extreme measures, requiring its Governor to close any school where school desegregation was contemplated. *See id.* at 82. For a study of the 1958 closing of the public schools in Norfolk, Virginia in response to *Brown I* and the role journalism played in facilitating subsequent desegregation, see generally ALEXANDER LEIDHOLDT, STANDING BEFORE THE SHOUTING MOB: LENOIR CHAMBERS AND VIRGINIA'S MASSIVE RESISTANCE TO PUBLIC-SCHOOL INTEGRATION

that the closing of the county's schools while other public schools in the state remained open violated the Equal Protection Clause of the Fourteenth Amendment.[27] A decade after the *Brown I* decision, the Court in *Griffin* decisively rejected extreme tactics to impede the implementation of *Brown I* and indicated that the pace of school desegregation could no longer be stymied.[28] The passage of the Civil Rights Act of 1964 further spurred the dismantling of the last barriers to desegregation.[29]

3. Green's *Mandate of Affirmative Action to Remedy School Segregation*

Brown II specified remedial steps that considered "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis. . . ."[30] Due to residential racial segregation in many localities, attendance zones could be drawn to maintain a dual school structure.[31] Where little residential segregation existed, enabling the provision of integrated education through the utilization of geographical districts, some school districts in the South adopted "freedom of choice" plans permitting students to choose from among at least two public schools for their education.[32] Few African-Americans chose, however, to attend previously segregated white schools due to misinformation, intimidation, or lack of free transportation.[33] In *Green v. County School Board*,[34] the Supreme Court invalidated a Virginia county school board's "freedom of choice" plan as inadequate to convert the school district from a dual system to a unitary system.[35]

(1997). Norfolk's schools were closed for 141 days, from September 27, 1958 to January 26, 1959. *See id.* at 92, 118.

[26] 377 U.S. 218 (1964).

[27] *See id.* at 232. Prince Edward County's School Board refused to levy taxes to operate the county's schools, using school closure as a technique to avoid the requirements of *Brown I*. *See id.* at 222–23. For a discussion of the *Griffin* litigation, see WILKINSON, *supra* note 23, at 97–101.

[28] *See Griffin*, 377 U.S. at 233–34. Prince Edward County's obstruction of school desegregation has been credited with causing the Supreme Court to vest the district courts with sweeping equitable powers. *See* WILKINSON, *supra* note 23, at 100–01.

[29] *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 511 (2d ed. 1991).

[30] Brown v. Board of Educ. (Brown II), 349 U.S. 294, 300–01 (1955).

[31] *See* STONE, *supra* note 29, at 511.

[32] For a description of "freedom of choice" desegregation plans, see JEFFREY A. RAFFEL, HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE 108–09 (1998).

[33] *See id.* at 109.

[34] 391 U.S. 430 (1968).

[35] *See id.* at 441–42. Unitary status under *Green* meant the dismantling of segregation

Green has been described as "[t]he most significant post-*Brown* decision by the U.S. Supreme Court that helped to define the standards by which the Court judged whether a violation of the U.S. Constitution had been remedied in school segregation cases."[36] Prior to *Green*, the remedial objective in school desegregation cases was to eliminate race-based pupil assignments. After the *Green* decision, school districts were required to take affirmative actions to convert their schools into a racially balanced, integrated school system.[37] A racially neutral school assignment policy did not suffice to eliminate a constitutional violation stemming from a segregated school system.[38]

4. Swann's *Sanction of Busing and Shift in the Burden of Proof to School Districts*

In *Swann v. Charlotte-Mecklenburg Board of Education*,[39] the Court extended *Green*'s affirmative remedial obligations in rural dual systems to urban school districts.[40] The school district, encompassing the city of Charlotte, North Carolina and the surrounding Mecklenburg County, had instituted a desegregation plan based on geographical zoning and free transfer provisions that proved ineffective.[41] The Court established the remedial principle that the scope of the remedy is to be determined by the nature and extent of the constitutional violation.[42] It further ruled that a remedial decree is to be judged by its

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under the dual system and the effectuation of racially integrated education, free of discrimination. *See* RAFFEL, *supra* note 32, at 257.

[36] RAFFEL, *supra* note 32, at 113.

[37] The *Green* Court ruled that an affirmative duty rests upon school board officials to take whatever steps are necessary to convert the school system to a unitary one in which racial discrimination is eliminated root and branch. *See Green*, 391 U.S. at 437–38; RAFFEL, *supra* note 32, at 114. After *Green*, it became the school district's responsibility to create a system without identifiable white and black schools. *See* AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 92–93 (1997). The purpose of a desegregation program was to convert a dual system into a nonracial system. *See Green*, 391 U.S. at 437–38.

[38] *See* WELLS & CRAIN, *supra* note 37, at 92–93. The *Green* decision is attributed with ending the use of freedom of choice plans to meet *Brown I*'s requirements. *See* BRIAN L. FIFE, SCHOOL DESEGREGATION IN THE TWENTY-FIRST CENTURY: THE FOCUS MUST CHANGE 9 (1997).

[39] 402 U.S. 1 (1971). For a discussion of *Swann*, see DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 29–34 (1995); FIFE, *supra* note 38, at 10–12; GREGORY S. JACOBS, GETTING AROUND *BROWN*: DESEGREGATION, DEVELOPMENT, AND THE COLUMBUS PUBLIC SCHOOLS 31–34 (1998).

[40] *See* PAUL R. DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION 56 (1985). The Charlotte-Mecklenburg school system was the nation's 43rd largest school district, encompassing 550 square miles. *See* RAFFEL, *supra* note 32, at 247.

[41] *See Swann*, 402 U.S. at 6–7.

[42] *See id.* at 16. The Court in *Swann* stated: "[T]he nature of the violation determines the

effectiveness.[43] Thus, the Court, by ruling that a school district should take whatever steps are necessary to achieve integration, moved further towards a results oriented approach.[44] Three other significant legal advances have been attributed to *Swann*. First, the assignment of students to schools closest to their homes did not meet the Court's remedial standards where past discrimination had been practiced.[45] In *Swann*, the Court sanctioned remedying segregation through pupil reassignment, commonly known as "busing," and the alteration of attendance zones.[46] Second, the Court placed the burden of proof on the school district to show that the schools' racial composition did not result from past or present discriminatory conduct.[47] Third, the Court validated pupil assignments on the basis of race, recognizing that the achievement of integration depended upon the use of race for such decisions.[48]

Swann's approval of busing to remedy unconstitutional school segregation stemmed from the Court's new belief that only mandatory pupil reassignments could dismantle the persistence of dual schooling in the South.[49] Transporting students to public schools distant from their residences to achieve greater integration proved unpopular, however.[50] White parents resisted busing their

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scope of the remedy." *Id.*; *see also* Milliken v. Bradley (Milliken I), 418 U.S. 717, 744 (1974) (citing this remedial principle from *Swann* as the controlling principle). The *Milliken I* Court held that judicial remedies could not be imposed upon governmental units not involved in or affected by a constitutional violation. *See id.* at 752. In *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977), the Court stated that this equitable principle "means simply that federal-court decrees must directly address and relate to the constitutional violation itself."

[43] *See Swann*, 402 U.S. at 25 (stating that a remedial decree "is to be judged by its effectiveness").

[44] *See id.* at 26; *see also* HASKINS, *supra* note 15, at 155; Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 701 (1971). The Court upheld the following desegregation remedies: "reasonable bus transportation, reasonable grouping of noncontiguous zones, the reasonable movement toward the elimination of one-race schools, and the use of mathematical ratios of blacks and whites in the schools as a starting point toward racial desegregation." FIFE, *supra* note 38, at 12. The grouping of noncontiguous zones could include reassigning white and black students, previously attending a predominantly white or a predominantly black school, so as to achieve racial balance within both schools. *See id.* at 11–12.

[45] *See Swann*, 402 U.S. at 27–29 (approving the pairing, clustering or grouping of noncontiguous schools); *see also* Fiss, *supra* note 44, at 699–700. These remedial measures involve the reassignment of students to attend different grades at different schools to desegregate two or more schools; RAFFEL, *supra* note 32, at 56 (explaining that if a K–5 black school and a K–5 white school be paired—for example, all students could be reassigned to one school for K–2 and the other for grades 3–5).

[46] *See Swann*, 402 U.S. at 27, 30.

[47] *See id.* at 26; *see also* Fiss, *supra* note 44, at 700–01.

[48] *See* Fiss, *supra* note 44, at 702–03.

[49] *See* DIMOND, *supra* note 40, at 58.

[50] *See* JACOBS, *supra* note 39, at 26–34 (describing busing's origin as a remedy and the

children into areas with predominantly minority populations, making it politically difficult to achieve integration.[51] When massive busing plans were put into effect, African-American students more often than white students were assigned to schools some distance from their residences.[52] In 1983, a Senate bill proposed denying the federal judiciary the jurisdiction to order the assignment or transportation of public school students.[53] Although Congress did not enact the legislation, its introduction and consideration illustrates how politicized the busing issue had become.

5. *The Extension of Liability in States Without a Record of Mandated School Segregation*

Keyes v. School District No. 1, Denver, Colorado,[54] decided in 1973, was the first nonsouthern school desegregation lawsuit before the Supreme Court after *Brown I*.[55] For the first time, the Court upheld remedial busing to achieve racial

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backlash that developed during the 1970s to busing); *see also* STEVEN J. L. TAYLOR, DESEGREGATION IN BOSTON AND BUFFALO: THE INFLUENCE OF LOCAL LEADERS 2 (1998) ("Of those political issues with a strong racial content, very few have inflamed the public more than school desegregation, particularly when it is attempted in the form of busing."). Many parents, both black and white, preferred schooling for their children close to home. *See* HASKINS, *supra* note 15, at 154. Black parents feared sending their children into a hostile school environment. *See* JACOBS, *supra* note 39, at 31; TAYLOR, *supra* at 208. A comparison of the effects of busing in Buffalo and Boston showed that antibusing leaders did not hold the African-American community responsible for remedial busing, but the masses in Boston made the black children bused into their neighborhood the focus of their anger. *See id.* at 208–09. In Buffalo, antibusing leaders viewed busing as the result of a misguided district court judge. *See id.* at 206.

[51] *See* JACOBS, *supra* note 39, at 28. For a discussion of opposition to busing, which was advocated to further integration in New York City schools, see TAYLOR, *supra* note 24, at 157. White parents opposed to busing launched a demonstration of 15,000 people at the Board of Education's headquarters in 1964. *See id.*

[52] *See* Alison Morantz, *Desegregation at Risk: Threat and Reaffirmation in Charlotte*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 181, 186–87, 199–200 (Gary Orfield et al. eds., 1996); TAYLOR, *supra* note 24, at 147.

[53] *See* STAFF OF SENATE COMM. ON THE JUDICIARY, 98TH CONG., 1ST SESS., NEIGHBORHOOD SCHOOL TRANSPORTATION RELIEF ACT: S. 1647 (Comm. Print 1983). President Johnson's administration supported busing or other remedial measures to achieve integration, but President Nixon viewed busing as "forced integration." *See* HASKINS, *supra* note 15, at 154–55. Despite political opposition, the Supreme Court continued to support busing as seen in its 1971 decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *See* HASKINS, *supra* note 15, at 155.

[54] 413 U.S. 189 (1973).

[55] For a discussion of *Keyes v. School District No. 1, Denver, Colorado*, see FIFE, *supra* note 38, at 12–14; James J. Fishman & Lawrence Strauss, *Endless Journey: Integration and the Provision of Equal Educational Opportunity in Denver's Public Schools: A Study of* Keyes v. School District No. 1, *in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 185–224 (Barbara Flicker ed., 1990).

balance in states without a history of mandated school segregation.[56] After *Keyes*, the liability requirements of *Brown I* were modified to encompass segregated schooling arising from de facto housing segregation unless a school district could prove that it did not cause the segregation.[57] The Court ruled that de jure segregation in one geographical area of a school district in a state that had never mandated segregated education by statute could require a desegregation remedy for the entire school district.[58] The Court thus expanded the scope of implementation remedies by ordering system wide remedies in school districts where actions such as the placement of schools or the assignment of students may have caused the segregation of students by race without statutes or constitutions mandating a dual system.[59]

Following *Keyes*, litigation was instituted against many nonsouthern school districts for intentionally segregating students on the basis of race, and district court judges employed mandatory busing as a remedial measure once liability was found.[60] Localities with very segregated housing patterns,[61] but without a history of racial separation by law, suddenly faced racial issues previously absent from their political discourse.[62] Boston, for example, encountered many difficulties in the implementation of a school desegregation plan, and violence erupted necessitating the presence of state law enforcement agents.[63] Buffalo, a

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[56] Racism and discriminatory treatment existed in Colorado without the presence of state-mandated segregated education. *See generally* Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703 (1999) (finding that Colorado's history is marked by a wide range of discriminatory conditions and focusing on the effect of discriminatory treatment upon higher education opportunities).

[57] *See* ARMOR, *supra* note 39, at 34.

[58] *See Keyes*, 413 U.S. at 200, 203–04, 213–14.

[59] *See* RAFFEL, *supra* note 32, at 139–40. The complexity of racism makes it difficult to isolate its causes. Racially discriminatory behavior has been attributed to unconscious racial motivation. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 30 STAN. L. REV. 317, 327 (1987) ("[O]bserv[ing] that Americans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness.").

[60] *See* TAYLOR, *supra* note 50, at 1. Even states reputed as open to civil rights issues, such as New York and Massachusetts, failed to address issues raised by the advocates of school desegregation in the late 1960s and early 1970s. *See id.* at 5.

[61] A comparison of the implementation of school desegregation in Buffalo and Boston found that expanding black populations after World War II in both cities were rigidly segregated. *See id.* at 4. Segregated housing patterns resulted in segregated schools. *See id.* at 5.

[62] *See id.* at 2.

[63] *See id.* at 3. A race riot broke out in the cafeteria of Boston's Hyde Park High School on September 19, 1974; stabbing incidents and other violence continued throughout the school year. *See id.* at 136–37. The greatest level of violence occurred at South Boston High School where buses transporting black students on the first day of the 1974–1975 school year were stoned by residents standing on the streets. *See id.* at 137–38.

city reflecting demographic similarities to Boston, on the other hand, implemented school desegregation without violence two years later in 1976.[64] A study attributes the different result to the type of leadership provided by elected officials in these communities.[65] In Boston, elected officials opposed Judge W. Arthur Garrity, Jr.'s desegregation orders whereas Buffalo's leaders sought to cooperate with the court by participating in the development of a plan they hoped would minimize any disruptions caused by the desegregation process.[66]

B. Milliken I's *Limit on Interdistrict Remedies*

In 1974, the Court in *Milliken v. Bradley* (*Milliken I*)[67] limited the federal judiciary's powers to remedy school segregation in urban school districts through the imposition of metropolitan-wide remedies that included suburban areas.[68] This decision ended an era of significant strides in the desegregation of public schools that began in 1964.[69] In *Milliken I*, the Court ruled that an interdistrict remedy could not be imposed without an interdistrict constitutional violation or interdistrict effects.[70] Thereafter, district courts could address unlawful segregation only within the boundaries of an incorporated geographically defined area empowered to provide public education. In a number of cities, such incorporated municipal areas could not provide integrated education because residential segregation and the steady migration of whites to suburbia since World

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[64] *See id.* at 3. One year after Buffalo's desegregation program began, specialized magnet schools were created that resulted in the voluntary enrollment of white students in inner city schools which previously provided education predominantly to minority students. *See id.* The involuntary busing of white students was not implemented until later in the desegregation process after many parents already had experienced their children voluntarily boarding buses to attend a magnet school. *See id.* at 126. Many parents saw the mandated busing as an extension of popular magnet school programs. *See id.*

[65] Although Buffalo Mayor James D. Griffin had assumed a leadership role opposing busing before he became mayor, he did not make desegregation an issue and maintained that District Court Judge John T. Curtin's decision had to be obeyed. *See id.* at 117. Horrified by television coverage of the antibusing violence in Boston, Buffalo's elected Board of Education, comprised of three black and six white members, sought to avoid violence in Buffalo and cooperated with the district court. *See id.* at 98–99.

[66] *See id.* at 130. Realizing that desegregation was inevitable, the Buffalo Board of Education voted 9–0 to develop a desegregation plan. *See id.* at 131. Conversely, those protesting in Boston's antibusing movement did not seem to realize that protest would not change Judge W. Arthur Garrity, Jr.'s decision. *See id.* at 130. Boston's antibusing leaders did not perceive the need to urge nonviolence. *See id.*

[67] 418 U.S. 717 (1974). For a discussion of *Milliken I*, see ARMOR, *supra* note 39, at 38–41; FIFE, *supra* note 38, at 14–16.

[68] *Milliken I* was the first major United States Supreme Court decision that limited rather than expanded the scope of desegregation remedies. *See* ARMOR, *supra* note 39, at 41.

[69] *See* Orfield, *supra* note 11, at 1.

[70] *See Milliken I*, 418 U.S. at 752–53.

War II caused predominantly nonwhite populations to reside within them.[71] The population of some school districts contained so few white students that integration proved impossible without crossing city-suburban boundary lines.[72]

C. Milliken II's Funding Requirements and the Shift in Focus from Pupil Reassignment to the Achievement of Educational Quality

In 1977, in *Milliken v. Bradley* (*Milliken II*),[73] the Court established that desegregation plans could include ancillary remedial or compensatory funded educational programs such as in-service training for teachers and administrators, guidance and counseling programs, remedial reading programs, and revised testing procedures.[74] The Court rejected the State's argument that the unconstitutional segregation of students on the basis of race must be remedied solely by addressing unlawful pupil assignments.[75] Ruling that a desegregation remedial decree must restore the victims of discriminatory conduct to the position they would have occupied in the absence of the conduct, the Court held that those children who had been segregated were more likely to need an educational remedy.[76]

In view of *Milliken I*'s limitation upon metropolitan-wide desegregation remedies and *Milliken II*'s remedial expansion to cover a school district's educational components, district court judges shifted their focus to the implementation of educational improvements.[77] Increasingly, they ordered the funding of programs and facilities to improve the quality of education in minority

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[71] Because of residential segregation patterns and the exodus of large white populations to the suburbs, school desegregation has remained largely an urban phenomenon. *See* Jenkins v. Missouri, 639 F. Supp. 19, 38 (W.D. Mo. 1985); FIFE, *supra* note 38, at 15. Judge Russell G. Clark stated that clear evidence indicated that further student reassignments in Kansas City would "reduce the potential for desegregation." *Id.* He thereby sought other means, such as volunteer interdistrict transfers and capital improvements, to accomplish desegregation within a school district whose enrollment was 68.3% black. *See id.* at 38–39, 53–54.

[72] *See* Orfield, *supra* note 11, at 1.

[73] 433 U.S. 267 (1977). For a discussion of *Milliken II*, see DIMOND, *supra* note 40, at 174–76; FIFE, *supra* note 38, at 16–20; RAFFEL, *supra* note 32, at 166.

[74] *See Milliken II*, 433 U.S. at 272, 275–77, 281–88; RAFFEL, *supra* note 32, at 166.

[75] *See Milliken II*, 433 U.S. at 281. The district court ordered that the cost of the remedial educational programs be equally shared by the Detroit School Board and the State. *See id.* at 277. The State defendants challenged the state's obligation to fund the costs of the remedial programs. *See id.* at 279.

[76] *See id.* at 281–82, 287–88; RAFFEL, *supra* note 32, at 166.

[77] For example, the district court in *Milliken II* ordered the Detroit School Board and the State defendants to institute comprehensive programs to address the four educational components of (1) reading, (2) in-service training, (3) testing, and (4) counseling and career guidance. *See Milliken II*, 433 U.S. at 275–77.

populated school districts.[78] School districts turned to the federal judiciary for additional dollars and special programs.[79] During the 1980s, district courts moved away from the pursuit of greater racial diversity, remedied by busing, toward greater reliance upon voluntary or choice techniques.[80] Remedial desegregation measures began to include voluntary transfer plans to attract minority students to schools with predominantly white populations and the creation of specialized magnet schools designed to pursue excellence in a particular programmatic area.[81] The federal judiciary expected that magnet schools would induce white students seeking higher quality facilities and programs to enroll in schools attended by many minority students.[82]

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[78] *See, e.g., id.* at 279–88 (upholding the use of remedial educational programs as part of a school desegregation decree); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 394 (5th Cir. 1967) (ordering a remedial educational program to enable students previously attending segregated schools to overcome past inadequacies in their education); Berry v. School Dist. of Benton Harbor, 515 F. Supp. 344, 369–73 (W.D. Mich. 1981) (finding a social skills and achievement component to the court-ordered desegregation plan necessary to effectively remedy effects of past unconstitutional segregation); Kelley v. Metropolitan County Bd. of Educ., 492 F. Supp. 167, 191 (M.D. Tenn. 1980) (rejecting pupil assignments as the sole desegregation remedial tool and finding the necessity for educational components in a desegregation remedial plan); Liddell v. Board of Educ., 491 F. Supp. 351, 357 (E.D. Mo. 1980) (upholding magnet schools, a variety of specialty programs, and enrichment programs that included remedial features as components of a desegregation plan).

The new focus on quality education led the courts to devise remedies that lacked the definiteness of pupil reassignment remedies. The court in *Coalition to Save Our Children v. State Board of Education of Delaware*, 757 F. Supp. 328, 359–60 (D. Del. 1991), authorized the implementation of magnet school programs and student reassignments through choice as permissible remedial measures in addition to pupil reassignment feeder patterns. The court noted that the latter plans alone were unlikely to remedy the effects of racial imbalance. *See id.* at 351–54. According to the court in *Coalition to Save Our Children*, the actual validity of magnet schools as a remedial measure remains unknown until educational outcomes are assessed. *See id.* at 336. The degree to which the goal of integration can be fostered by setting higher than average teacher salaries, by introducing supplemental programs, such as after school tutoring and early development programs, and by improving school physical facilities, cannot be answered with certainty. *See id.* at 352. Thus a clear measurement of whether these remedies removed constitutional violations remained lacking. *See id.* at 352–53.

A study conducted by the Harvard Project on School Desegregation concluded that the reliance upon additional funding and specialized educational programs to remedy the harms created by segregated education proved ineffective. *See* FELDMAN ET AL., *supra* note 11, at 5.

[79] *See* RAFFEL, *supra* note 32, at 166. ("Critics have viewed *Milliken II* as a re-institution of the separate but equal doctrine as school districts trade off school desegregation for extra money and special programming.").

[80] *See* ARMOR, *supra* note 39, at 48.

[81] *See id.* at 47–48. For a definition of a magnet school, see RAFFEL, *supra* note 32, at 149.

[82] For example, in *Jenkins*, District Court Judge Russell G. Clark stated: "The long term goal of this Court's remedial order is to make available to all KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." Jenkins v. Missouri, 639 F. Supp. 19, 54

Quality educational remedies required a massive infusion of capital into the school systems subject to desegregation orders.[83] Urban school districts, geographically confined, frequently lacked the financial resources to implement the remedies imposed by the courts.[84] They seized upon desegregation orders as leverage to obtain more state money to fund their operations.[85] District courts soon became decision makers as to the share of the education costs that should be born by the state and thus by all the taxpayers in the state.

D. Milliken II's *Three Part Test*

In *Milliken v. Bradley* (*Milliken II*), the Court consolidated remedial rules it had earlier forged in *Green* and *Swann* into the following three equitable rules to guide the crafting of future remedial desegregation decrees:

(1) The nature of the remedy is to be determined by the nature and scope of the constitutional violation.[86]

(W.D. Mo. 1985); *see also* Lynn Byczynski, *Judge Raises Taxes to Pay for School Bias Remedy*, NAT'L LAW J., Oct. 5, 1987, at 25 (stating that the KCMSD remedial program was "designed to attract white students from the suburbs and private schools to help balance the 74 percent minority district").

[83] *See* Howard I. Kalodner, *Overview of Judicial Activism in Education Litigation*, *in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 3, 6 (Barbara Flicker ed., 1990) (transporting children to magnet schools, providing special or remedial education to assist in the educational process, and paying the costs of lawyers and other litigation expenses all increase the costs of the public educational system).

[84] *See id.* at 6 (finding limited financial resources in many cities due to population movements that have depleted the tax base at the same time that the costs of municipal government have risen dramatically).

[85] *See* Missouri v. Jenkins, 495 U.S. 33, 59–60 (1990) (Kennedy, J., concurring) (noting the KCMSD's friendly relationship with the plaintiffs and its lack of concern for the costs associated with the expensive magnet school remedies); Kelley v. Metropolitan County Bd. of Educ. of Nashville, 836 F.2d 986, 987–88 (6th Cir. 1987) (reversing the district court's order to the state to assume 60% of the costs attributable to the board of education's desegregation plan in response to the board's request for state assumption of these costs); *see also* CARL MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 79 (1969) (expanding constitutional concepts like equal protection cause people to turn more to the courts for relief against alleged oppressions); Lynn Horsley, *School Accord Reached; Tentative Settlement on Magnet Funding Reduces State's Share by $22 Million*, KAN. CITY STAR, Feb. 17, 1995, at A1 (reporting on marathon negotiations to reach a settlement on magnet school funding that involved the school district, the plaintiffs, the state governor, and the Missouri education commissioner).

[86] *See* Milliken v. Bradley (Milliken II), 433 U.S. 267, 280 (1977). This rule is derived from *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). *See supra* note 42 and accompanying text. This rule directs the court to examine the nature and extent of the constitutional violation that has been committed by the local governmental unit in operating a school system to determine the scope of the remedy. *See Swann*, 402 U.S. at 16. This rule

(2) The decree must be remedial in nature. It must be designed to the extent possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[87]

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implies that the greater the constitutional violation, the greater the need for an extensive remedial process. The rule is viewed as one that maximizes rights. *See infra* notes 87–93 and accompanying text.

The rule has been criticized as too open ended to be applied in a consistent manner. *See* Friedman, *supra* note 1, at 743–45; Yoo, *supra* note 4, at 1132. Later Supreme Court decisions tightened this rule to emphasize a closer nexus between the remedy and the constitutional violation it is designed to correct. *See* Hills v. Gautreau, 425 U.S. 284 (1976) (citing *Swann*, 402 U.S. 1) ("Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'"); *see also Gautreau*, 425 U.S. at 293–94.

In *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), the Court found the system wide remedy imposed by the district court to be out of proportion to the constitutional violations in the absence of findings that such a remedy was necessary to eliminate all vestiges of school segregation. *Brinkman*, 433 U.S. at 418. The Court laid down more specific guidelines upon the finding of a constitutional violation with the ruling that the district court:

> (1) must determine how much incremental segregative effect these violations had on the racial distribution of the... school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and
>
> (2) [O]nly if there has been a systemwide impact may there be a systemwide remedy.

Id. at 420 (Powell, J., concurring) (citation omitted).

By limiting the judiciary's remedial processes to correct only those constitutional violations found, the Court seeks to limit the extent to which judicially imposed remedies become a tool to address broad social, political, and economic problems outside of the context of the litigation. For example, in *Evans v. Buchanan*, 555 F.2d 373 (3d Cir. 1977), the court stated:

> A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable. The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. The remedy for a constitutional violation may not be designed to eliminate arguably undesirable states of affairs caused by purely private conduct (*de facto* segregation) or by state conduct which has in it no element of racial discrimination. This much is settled by *Milliken v. Bradley*....

Id. at 379.

[87] *Milliken II*, 433 U.S. at 280. The Court added a rights maximizing rule, earlier stated in *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 746 (1974), that relates to the effectiveness of the remedy. This rule is derived from *Swann* and echoes the goal set forth in *Green*'s emphasis upon affirmative action to convert a segregated school system "to a unitary system in which racial discrimination would be eliminated root and branch." Green v. County Sch. Bd., 391 U.S. 430, 437–48 (1968). This rule measures judicial decrees by their effectiveness and stops at nothing short of complete equalization for those who have suffered discriminatory conduct. *See id.* It calls for the complete elimination of the effects of constitutional violations. *See* Morgan v.

(3) The "interests of state and local authorities in managing their own affairs, consistent with the Constitution" must be taken into account in devising the remedy.[88]

Rules number one and two focus exclusively on the remedial efforts necessary to restore the victims of discriminatory conduct to the position they would have achieved in the absence of the constitutional violations. This approach has been termed "rights maximizing."[89] School desegregation opinions following *Milliken II* placed more emphasis upon rights maximizing rules, number one and two, than upon the third rule's "interest balancing"[90] inquiry.[91]

Kerrigan, 530 F.2d 401, 415–16 (1976).

Professor Barry Friedman has criticized rule number two as "redundant and uninformative." Friedman, *supra* note 1, at 745. He has pointed out that the rule supports compensation for the victims of discriminatory conduct, a goal at odds with the Court's Eleventh Amendment jurisprudence that focuses on prospective relief. *See id.* at 745–46. Professor Richard A. Epstein has criticized this rights maximizing rule as ignoring remedial limitations applicable in the private law of remedies and the reality that not all innocent plaintiffs can be restored to the positions they would have enjoyed in the absence of the constitutional violation. *See* Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101, 1111 (1996).

[88] *Milliken II*, 433 U.S. at 280–81. Rule number three stems from a statement in *Swann*. *See Swann*, 402 U.S. at 16. According to *Swann*, the "task [in framing equitable remedies] is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Id.*

Rule number three suggests awareness that rights cannot be restored in a vacuum, but must be remedied in an ongoing political process that should result in greater awareness and sensitivity to the rights and needs of the plaintiffs. The inclusion of rule number three clearly calls upon the court to weigh the collective interests, including the ability of the locality and state to fund the remedial decrees, when devising a remedy to restore the victims to the position they would have occupied in the absence of discrimination. Rule number three has been criticized as contrary to the principle articulated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), that a remedy should be provided for every right violated. *See* Friedman, *supra* note 1, at 747.

[89] Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588–89 (1983). Many lower federal court decisions have cited *Swann* for authority to redress constitutional violations without examining the public burden such remedies impose. *See, e.g.*, Evans v. Buchanan, 416 F. Supp. 328, 345 (D. Del. 1976); Hart v. Community Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21, 383 F. Supp. 699, 752, 766 (E.D.N.Y. 1974); Dandridge v. Jefferson Parish Sch. Bd., 332 F. Supp. 590, 594 (E.D. La. 1971). This view is understandable given the absence of any reference to the principles of comity and federalism in the *Swann* opinion. *See* ELY, *supra* note 14, at 80–81 (arguing that the Constitution's checks and balances between the federal government and the states and among the three federal branches do not adequately protect minorities); Fiss, *supra* note 44, at 705–06 (arguing that segregated patterns of student attendance constitute the predominant concern in the *Swann* case rather than the past discriminatory acts causing segregation and that this concern triggers remedial plans that require school boards to take every possible step to eliminate segregation).

[90] Gewirtz, *supra* note 89, at 589. The interest balancing test stems from the statement in

Even the *Milliken II* Court ignored the thrust of the third rule, which acknowledges the worth of devising remedies that give local governments and school districts power to continue to manage their own affairs while remedying a constitutional violation.[92] It devoted numerous pages to a discussion of the use of remedial programs in court-ordered desegregation remedies, but failed to discuss the local concerns entailed in the operation of a public school system.[93] One explanation for this discrepancy may lie in the difficulty encountered in identifying the essential core elements of a successfully operating federalist

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Swann that individual and collective interests should be balanced in the process of remedying the constitutional violation. *See Swann*, 402 U.S. at 15–16. The *Swann* Court's admission that limitations exist as to the scope of remedies that the federal judiciary may impose has received even less recognition than the balancing test articulated in *Swann*. *See id.* at 28. After opining that remedies for school segregation may be "administratively awkward, inconvenient, and even bizarre in some situations," the Court stated: "No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits." *Id.*

[91] In *San Francisco NAACP v. San Francisco Unified School District*, 695 F. Supp. 1033 (N.D. Cal. 1988), the court stated, for example, that federal courts are obligated to protect constitutional rights of school children, a mission that cannot be thwarted by lack of funding or other political conditions. *See id.* at 1041–42. Relying upon rights maximizing principles, the district court in *Little Rock School District v. Pulaski County Special School District No. 1*, 597 F. Supp. 1220 (E.D. Ark. 1984), *remanded*, 778 F.2d 404, 408, 433–34 (8th Cir. 1985) (ordering less intrusive remedial measures than the district court's consolidation plan), emphasized that school desegregation remedies must be fashioned with a scope and nature to correct the constitutional violations found. *See Pulaski*, 597 F. Supp. at 1228. Victims of the discrimination must be restored as nearly as possible to the position they would have occupied in the absence of discrimination. *See id.* The court made no reference to state and local interests in its summary of the reasons given for its remedial desegregation orders. *See id.* A critique of *Milliken II*'s rights maximizing rules notes that "[t]he Court does not appear to have ever invalidated a structural remedy on the ground that it improperly intruded upon the proper authority of state and local institutions." Yoo, *supra* note 4, at 1133 (footnote omitted).

In *Evans v. Buchanan*, 455 F. Supp. 715, 723 (D. Del. 1978), the district court noted the tension between the principles of federalism and the court's judicial duty to enforce equitable decrees to vindicate constitutional rights. The court stated its preference to enforce remedial decrees "however unpopular or economically unattractive." *Id.*

[92] Given the extent of the past and present racial discrimination that exists in American society, the Court's rights maximizing approach is not surprising. The Supreme Court, in fact, in *Milliken II*, for the first time, addressed the issue of whether remedial and quality education programs could be mandated as part of a remedy for unconstitutional segregation. *See Milliken II*, 433 U.S. at 279. The answer was yes. *See id.* at 279, 287–88.

[93] It is also noteworthy, as Justice Powell pointed out in his concurring opinion in *Milliken II*, that the local school board enthusiastically endorsed the *Milliken II* remedies even though they intruded upon its decision-making processes. *See Milliken II*, 433 U.S. at 292–93. The board stood to receive $5,800,000 from the state to fund the educational components. *See id.* The Court summarily dismissed the claim that the relief ordered violated the Tenth Amendment and general principles of federalism in one paragraph. *See id.* at 291.

system.[94]

While many courts ignore *Milliken II*'s third rule,[95] some opinions do express a need for greater sensitivity to local and state concerns in crafting remedies. In *Diaz v. San Jose Unified School District*,[96] one of the few reported school desegregation decisions that have elaborated upon *Milliken II*'s three-part test, the district court stated that the court's remedy should be responsive not only to the abridgment of the plaintiffs' constitutional rights, but also to the collective interests affected by the remedial plan.[97] The court noted that the burden of devising an effective remedial plan fell upon the defendant school district and emphasized a balancing of both individual and collective interests.[98] It declined to impose student reassignment mandates, a remedial plan proposed by the plaintiffs, until the school district had the opportunity to maximize voluntary choices to achieve desegregation through the use of magnet schools.[99] The court concluded that the district's operation of magnet schools would be more effective than the plaintiffs' proposed remedy, which could cause community bitterness and a decline in the number of majority students according to expert testimony.[100]

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[94] The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Contemporary definitions of federalism focus on the division of power between the states and the federal government. *See* Martin Diamond, The Federalist *on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 YALE L.J. 1273, 1277 (1977). The retention of power at the state level is viewed as making the United States government a federal one. *See id.* at 1279. Professor Diamond argues, however, that *The Federalist* shows that the Framers viewed the central government as comprised of both national and federal elements. *See id.* at 1277–79. The central government is national as to the extent of the powers granted to it, but it contains federal elements such as the Electoral College and the Senate. *See id.* at 1278–79.

Historically, the values of federalism have been difficult to articulate and define. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 HARV. L. REV. 2180, 2243 (1998) (pointing out that the core values of individual rights and liberties appear in many jurisprudential systems, but that identifying core federalism values is harder); Yoo, *supra* note 4, at 1134 (noting the difficulty courts experience in identifying the elements of local authority that deserve federalism protections). In a 1997 article, Professor Barry Friedman asserted that federalism is undervalued because not enough effort has been made to measure the worth of the values it serves. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 317 (1997).

[95] *See, e.g.*, *San Francisco NAACP*, 695 F. Supp. at 1042 (referring to *Milliken II* as precedent to support the district court's order to the state to pay desegregation costs without mentioning the three-part test).

[96] 633 F. Supp. 808 (N.D. Cal. 1986), *aff'd*, 861 F.2d 591 (9th Cir. 1988).

[97] *See id.* at 811.

[98] *See id.* at 811–12.

[99] *See id.* at 810, 827.

[100] *See id.* at 812–14.

E. *Unitary Status*

In *Green*, the Court held that a school system achieves unitary status only when racial discrimination has been eliminated completely.[101] The *Swann* Court believed that at some point full compliance with *Brown I* would be achieved making further intervention by a district court unnecessary.[102] However, these opinions did not address the issue of whether a district can abandon a desegregation plan after achieving unitary status or whether it remains subject to a duty to attain racial balance indefinitely.[103]

In *Board of Education of Oklahoma City Public Schools v. Dowell*,[104] the Court held that once a school district eliminates the vestiges of past discrimination to the extent possible and exhibits good faith compliance with a desegregation order, judicial supervision can terminate.[105] In considering whether the vestiges of de jure segregation had been eliminated, the district court was instructed to examine every facet of school operations, including student assignments.[106] The question remained after *Dowell* whether a district court could relinquish its control over a school district in incremental stages as compliance with *Brown I*

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[101] *See* Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968). A unitary system has been defined as follows:

> A school system judged by the federal courts to no longer be a dual system,* that is, operating one system for majority and one for minority children; thus the school district has corrected the problem of segregation* and is released from direct monitoring by the federal District Court* of the implementation of the school desegregation plan.* When districts lack unitary status and are under a court order, they must receive approval for all changes to the desegregation plan from the plaintiffs and the court.

RAFFEL, *supra* note 32, at 256.

[102] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31–32 (1971).

[103] *See* ARMOR, *supra* note 39, at 49.

[104] 498 U.S. 237 (1991).

[105] *See id.* at 248–50. The Court stated that residential segregation in Oklahoma City, resulting from private decision making and economics, was too attenuated to constitute a vestige of past school segregation. *See id.* at 250 n.2; *see also* ARMOR, *supra* note 39, at 118.

[106] *See Dowell*, 498 U.S. at 250. The Court stated:

> The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable. In considering whether the vestiges of de jure segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but "to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities."

Id. at 249–50 (citations omitted).

was achieved. In *Freeman v. Pitts*,[107] the Court held that district courts have such authority.[108] Factors to be considered in incremental withdrawal included compliance with the desegregation decree in the areas to be removed from control, the impact of withdrawing supervision upon the other areas for which compliance had not been achieved, and good faith commitment to comply with the court's decree.[109]

F. Jenkins v. Missouri: *The Cost and Scope of* Milliken II*-Type Remedies Expand*

1. *The Complaint*

In 1977, the Kansas City Missouri School District (KCMSD) and a group of school students sued the States of Kansas and Missouri, suburban school districts in the Kansas City metropolitan area, and federal agencies for the implementation of a metropolitan-wide school desegregation plan.[110] The complaint alleged that the defendants' actions caused racially isolated and identifiable school districts to be maintained in the Kansas City metropolitan area.[111] The plaintiffs claimed that the defendants' discriminatory practices resulted in "white flight," the exodus of middle class families away from the KCMSD, causing a reduction in the KCMSD's tax base and increasing its operating expenses for the education

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[107] 503 U.S. 467 (1992).

[108] *See id.* at 490 ("We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental states, before full compliance has been achieved in every area of school operations.").

[109] *See id.* at 491.

[110] The plaintiffs sued the State of Kansas, its State Board of Education, certain Kansas school districts within the metropolitan area, the State of Missouri, the Missouri State Board of Education, certain Missouri school districts within the metropolitan area, the United States Departments of Housing and Urban Development; of Health, Education, and Welfare; and of Transportation. *See* School Dist. of Kansas City v. Missouri, 460 F. Supp. 421, 427 (W.D. Mo. 1978).

[111] *See id.* at 428. The complaint alleged that the States of Missouri and Kansas had caused increased racial segregation through piecemeal actions and the creation of arbitrary boundary lines. *See id.* at 427. The complaint also alleged that the States of Kansas and Missouri had failed to remedy the effects of previously state-imposed racial segregation. *See id.* at 428.

By 1976, African-Americans comprised 65% of the children enrolled in the KCMSD, up from less than 50% in 1960. *See* Alison Morantz, *Money and Choice in Kansas City: Major Investments with Modest Returns*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 244–45 (Gary Orfield et al. eds., 1996). The percentage of African-Americans in the KCMSD in 1994 reached 75%. *See id.* at 244.

of disadvantaged children.[112] Claiming that only a metropolitan solution could alleviate the area's segregated conditions, the plaintiffs sought a court-ordered reassignment of students in the KCMSD and in the suburban school districts to achieve a greater racial balance among students.[113]

As the litigation progressed, the district court dismissed many of the party defendants. In 1978, the State of Kansas and the Kansas suburban school districts were dismissed from the case for lack of personal jurisdiction.[114] At that time the district court also dismissed the KCMSD as a party plaintiff for lack of standing and rejoined it as a party defendant to the action.[115] In May 1979, after the KCMSD was realigned as a party defendant, the plaintiffs filed an amended complaint against the KCMSD and the original Missouri and federal defendants.[116]

In their amended complaint, the plaintiffs again claimed that their rights could be protected only by the reassignment of students among all the school districts in the metropolitan area.[117] The district court noted, however, that pursuant to the *Milliken I* standards it could not mandate an interdistrict remedy unless the defendants had acted unconstitutionally in a discriminatory way that caused interdistrict segregation.[118] Finding no interdistrict violation and no interdistrict effect, the district court in 1984 dismissed the suburban school districts.[119] Further, the court dismissed the federal defendants for lack of racial animus and

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[112] Disadvantaged children need greater individual attention, compensatory education, and counseling. *See School Dist. of Kansas City*, 460 F. Supp. at 428.

[113] *See id.* The plaintiffs alleged that the Kansas City, Missouri metropolitan area, covering over 50 local governments and school districts, constituted a single urban community that was integral from the perspectives of commerce, employment, recreation, cultural activities, utilities, and transportation issues. *See id.* at 427.

[114] *See id.* at 445.

[115] *See id.* at 444–45.

[116] *See* Jenkins v. Missouri (Jenkins I), 807 F.2d 657, 661 (8th Cir. 1986); Jenkins v. Missouri, 593 F. Supp. 1485, 1488 (W.D. Mo. 1984). The plaintiffs claimed that the KCMSD had ineffectively dealt with segregative patterns that had developed due to "impaction of minorities, white flight, housing policies of other agencies and 'other factors beyond the capacity of that district to manage.'" *See Jenkins*, 593 F. Supp. at 1488.

[117] *See Jenkins*, 593 F. Supp. at 1489. The plaintiffs alleged that Missouri, the suburban school districts, and the Department of Housing and Urban Development had committed interdistrict constitutional violations and that the State defendants and the KCMSD had committed intradistrict violations. *See Jenkins I*, 807 F.2d at 661.

[118] *See Jenkins*, 593 F. Supp. at 1488; *see also Jenkins I*, 807 F.2d at 672.

[119] *See Jenkins*, 593 F. Supp. at 1488–90. The district court found that the constitutional violations in the KCMSD had no effects in the suburban school districts and that no acts or omissions of the suburban school districts (SSDs) caused segregative effects in other school districts. *See Jenkins I*, 807 F.2d at 672, 674. The SSDs were found to have eliminated any vestiges of the former state-mandated dual system of education within at most four years after *Brown I* was decided. *See Jenkins I*, 807 F.2d at 669.

discriminatory actions,[120] leaving only the KCMSD and the State of Missouri as defendants.[121]

2. *The Imposition of Costly* Milliken II*-Type Remedies*

Dismissing the suburban school districts made desegregation efforts far more difficult and costly than would have been the case otherwise.[122] The imposition of an interdistrict remedy could have reassigned students living in the KCMSD to suburban schools and vice versa, resulting in greater integration. Given the high percentage of minority children in the KCMSD, racial balance within its schools was unobtainable by the pursuit of only intradistrict remedies.[123] The KCMSD and the plaintiffs opposed further mandatory student reassignment from that undertaken in earlier remedial attempts within the KCMSD, fearing additional white withdrawal from the school district.[124] Thus, the only remedial alternative left was the imposition of the more costly *Milliken II*-type remedies.

District Court Judge Russell G. Clark expressed frustration with the inability to implement an interdistrict desegregation plan that promised greater opportunities for pupil integration and quality education initiatives. Viewing the court's long-term remedial goal as one that would secure educational opportunities for Kansas City school children that equaled or surpassed those available to white suburban children, Judge Clark set out to achieve the benefits of an interdistrict plan in an inner-city school district.[125] He sought to attract

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[120] The Department of Health, Education, and Welfare (HEW) was dismissed "for plaintiffs' failure to prove the agency acted with racial animus or abused its discretion in the enforcement of Title VI." *See Jenkins*, 593 F. Supp. at 1488. The Department of Housing and Urban Development (HUD) was dismissed because plaintiffs failed to show that HUD had acted in a discriminatory fashion. *See id.* at 1498–1501.

[121] *See id.* at 1506.

[122] *See* Morantz, *supra* note 111, at 247 (discussing Judge Clark's reasons for dismissing the suburban school districts and his thoughts on the difficulty of integrating the KCMSD schools once the suburban districts were dismissed).

[123] In 1977, the enrollment in the KCMSD schools was comprised of 65.6% minority students. *See* Jenkins v. Missouri, 639 F. Supp. 19, 35 (W.D. Mo. 1985). In 1985, 19 of the 50 elementary schools had enrollments of 90% or more black students. *See id.* at 36.

[124] *See id.* White enrollment had decreased by more than 44% since a 1977 desegregation plan implemented by the KCMSD went into effect. *See id.* The district court refused to accept white flight as an excuse for the failure to desegregate public schools. *See id.* at 37. Nonetheless, the district court concluded that "further mandatory student reassignment at this time will only serve to increase the instability of the KCMSD and reduce the potential for desegregation." *Id.* at 38.

[125] *See id.* at 54. Judge Clark stated: "The long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." *Id.* (emphasis in the original).

In *Jenkins II*, the Eighth Circuit Court of Appeals characterized the district court's goals as

white students to voluntarily enroll in the KCMSD's schools primarily through the creation of many magnet programs and a massive capital improvement program.[126]

The remedial plan's design to increase educational achievement in the KCMSD was ambitious. The district court ordered the hiring of additional librarians, the recruitment of well-trained and qualified teachers, a reduction in class sizes, the implementation of a summer school program, the expansion of an all-day kindergarten program to include all students, early childhood development programs, and school tutoring.[127] Judge Clark also ordered the KCMSD to establish a staff development program in conjunction with public relations programs to inform and solicit the support of the community for the remedial plans.[128]

The court believed that the improvements in the quality of education offered by the KCMSD would maintain nonminority student enrollments.[129] It hoped that these improvements would increase the number of desegregative educational experiences available in the KCMSD by attracting a greater nonminority enrollment.[130] To further enhance racial diversity in the KCMSD, the court ordered the State to seek participation from the suburban school districts in a voluntary interdistrict transfer program.[131] Magnet schools and capital improvements to the KCMSD's facilities constituted the primary tools, however, to attract more white students to join minority students in Kansas City classrooms.[132]

The plaintiffs and the KCMSD proposed a comprehensive magnet program to make every senior high school, every middle school, and about half of the elementary schools in the KCMSD a magnet school. The plaintiffs thought that world-class facilities and the magnet schools' unique curricula would augment

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follows: "[F]irst, to improve the educational lot of the victims of unconstitutional segregation; second, to regain some portion of the white students who fled the district and retain those who are still there; and third, to redistribute the students within the KCMSD to achieve the maximum desegregation possible." *Id.* at 1302.

[126] *See Jenkins*, 639 F. Supp. at 39–41, 53–55.

[127] *See id.* at 26–33. The reduction in class size was believed to attract nonminority as well as minority students. *See id.* at 29. The all-day kindergarten program entailed the hiring of additional kindergarten teachers. *See id.* at 29, 31–32.

[128] *See id.* at 35. The court viewed staff development as an essential means to improve student achievement. *See id.*

[129] *See id.* at 38.

[130] *See id.*

[131] *See id.* at 38–39. The court ordered the State to pay the costs associated with the transfer of African-American students from the KCMSD schools to another school district in which their race was in the minority. *See id.* at 39.

[132] *See id.* at 34–35, 41; *see also* Morantz, *supra* note 111, at 248 (stating that the magnet plan was chosen because it was viewed as the only viable way to attract white students back into Kansas City).

the KCMSD's marketability to white parents.[133] Because the State assumed a litigation posture of opposing the plaintiffs' remedial approach without compromise, it alienated Judge Clark, who was committed to a comprehensive plan, and, as a result, made him more receptive to the plaintiffs' proposed remedies.[134] When the State failed to offer a scaled-down version of the comprehensive magnet plan, viewed as a tactical error on its part, Judge Clark lacked a credible alternative to the plaintiffs' sweeping magnet school proposal.[135]

The State and the KCMSD also sharply disagreed over capital improvement expenditures. The KCMSD estimated building rehabilitation costs to be between fifty-five million and seventy million dollars, whereas the State proposed that a twenty million dollars facilities program be undertaken with the State's contribution no greater than ten million dollars.[136] The district court rejected the State's arguments noting that more than health and safety improvements would be necessary to attract nonminority students into the KCMSD.[137]

Once the court ordered an initial capital improvement program at a cost of thirty-seven million dollars[138] and approved the plaintiffs' full-scale magnet plan,[139] the focus of the litigation turned to the financing of the mandated remedial measures. The cost to implement the remedial plan, exceeding well over a billion dollars, far outstripped the school district's resources.[140] Failing to examine its course of action from a long-term perspective, the district court embarked on a remedial plan, unprecedented in scope, that the KCMSD was

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[133] *See* Morantz, *supra* note 111, at 248. The plaintiffs also hoped that by magnetizing all schools, the elimination of a two-tiered system, in which nonmagnet schools received fewer resources and provided inferior education, could be avoided. *See id.*

[134] *See id.* at 249. Judge Clark characterized the State's policy of "total opposition" as counter-productive. *See id.*

[135] *See* Morantz, *supra* note 111, at 249.

[136] *See* Jenkins v. Missouri, 639 F. Supp. 19, 40 (W.D. Mo. 1985). The State's four reasons for its proposed $10,000,000 contribution were as follows: (1) the condition of the facilities was not traceable to the existence of any unlawful segregation found by the court; (2) the facilities had deteriorated because the KCMSD had failed to properly maintain them; (3) the proposed outlays were not necessary to effectuate the quality education components of the desegregation plan; and (4) the KCMSD's $55,000,000 to $70,000,000 estimates were excessive making a budget of $20,000,000 sufficient to address poor health and safety conditions in the KCMSD schools. *See id.*

[137] *See id.* at 41.

[138] *See id.* at 53.

[139] *See id.* at 54. In 1995, the Court stated that the magnet school program had operated at a cost of $448, 000, 000. *See* Missouri v. Jenkins, 515 U.S. 70, 77 (1995).

[140] Judge Russell G. Clark, who retained jurisdiction of the case for 19 ½ years until jurisdiction was turned over to Judge Dean Whipple in 1997, ordered expenditures in the range of $1,800,000,000. *See* Stephen Winn, *Clark's Final Assessment Is Portent Worth Heeding*, KAN. CITY STAR, March 29, 1997.

unable to finance, or even maintain for that matter, with its own resources.[141] Holding the KCMSD and the State jointly liable, the district court allocated many remedial costs to the State.[142] The Eighth Circuit Court of Appeals ruled, however, that the State should not be required to bear more than one-half of the total cost.[143]

In addition to challenging the district court's allocation of costs, the State also contested the scope of the district court's remedial measures[144] and challenged the court's power to raise local property taxes to fund them.[145] The Eighth Circuit Court of Appeals affirmed the district court's scope of remedies with slight modifications.[146] In Part II of this Article, the Eighth Circuit's treatment of the judicial taxation issues is discussed. The United States Supreme Court declined to review the district court's authority to order the expansive remedial program,[147] but granted certiorari with respect to the power of the district court to raise local property taxes.[148] Thus, the Court's 1990 *Jenkins* decision addresses the propriety of the district court's authorization of taxation and its removal of state law limitations to facilitate such taxation. In 1994, the Supreme Court granted certiorari, however, on the propriety of mandated salary increases as part of the

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[141] *See* Morantz, *supra* note 111, at 262. ("In *Jenkins*, the district court ordered new facilities on a scale so immense that the district would never be able to maintain them on its own."). *Jenkins* is viewed as "[representing] an extreme case of one popular type of desegregation remedy." *Id.* at 241.

In *Jenkins II*, on the rehearing en banc, Circuit Judge Bowman, dissenting from the denial of the rehearing en banc, stated:

> The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the large number of magnet schools and the quantity of capital renovation and new construction—are concededly without parallel in any other school district in the country. Similarly, in no other case has federal judicial power been used to impose a tax increase in order to provide funding for a desegregation remedy.

855 F.2d 1295, 1318–19 (8th Cir. 1988).

[142] *See* Jenkins v. Missouri, 639 F. Supp. 19, 43–44, 55–56 (W.D. Mo. 1985). Finding lingering vestiges of the prior state-mandated, dual school system, the district court held that the obligations of the State to both the plaintiffs and the KCMSD had not been met. *See* Jenkins v. Missouri, 593 F. Supp. 1485, 1504–05 (W.D. Mo. 1984). The imposition of joint liability makes it possible for one of the liable parties to make up any shortfalls that occur by reason of the other party's inability to pay its share of the costs.

[143] *See* Jenkins v. Missouri (Jenkins I), 807 F.2d 657, 686 (8th Cir. 1986).

[144] *See Jenkins II*, 855 F.2d at 1302–09.

[145] *See id.* at 1309.

[146] *See id.* at 1299.

[147] *See* Missouri v. Jenkins, 495 U.S. 33, 45 (1990) (citing Missouri v. Jenkins, 490 U.S. 1034, 1034 (1989)).

[148] *See* Missouri v. Jenkins, 490 U.S. at 1034.

ordered quality improvements and the district court's reliance upon the use of test scores to determine whether the state had achieved partial unitary status.[149] The Court resolved these issues in its 1995 *Jenkins* decision.

G. *The Supreme Court's Retreat in Its 1995* Jenkins *Decision*

The genesis of the Court's 1995 decision can be traced to 1987 when the district court first provided for teacher salary increases as part of its remedial desegregation plan for the KCMSD.[150] At that time, the State of Missouri did not contest this order.[151] When the KCMSD filed a motion in 1992–93 for approval of its desegregation plan that included salary increases for instructional and noninstructional staff, the State objected. It challenged the district court's salary funding for both instructional and noninstructional staff as exceeding the scope of the district court's remedial powers.[152] The State further contested the district court's order to continue funding remedial quality education programs, suggesting that the district court should enter a finding of partial unitary status for the State's quality improvement funding.[153] The court of appeals, upholding the district court orders, found that the State should not be relieved of its duty to fund the quality improvement programs because the vestiges of past discrimination—the system-wide reduction in student achievement and the white flight—had not been eliminated to the greatest extent possible.[154] The Supreme Court granted certiorari to consider the following: (1) the district court's authority to impose the salary increases and (2) the propriety of the district court's reliance upon student achievement test scores to determine whether partial unitary status had been reached for the quality improvement programs.[155]

The Court chose to review the scope of the district court's remedial power in determining the constitutionality of the salary increase orders. The Court affirmed its earlier standard set forth in *Milliken II* that a district court in addressing unconstitutional school segregation should restore the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct.[156] The Court ruled, however, that the district court's pursuit of a remedy

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[149] *See* Missouri v. Jenkins, 515 U.S. 70, 83 (1995) (citing Missouri v. Jenkins, 512 U.S. 1287, 1287 (1994)).

[150] *See* Jenkins v. Missouri, 672 F. Supp. 400, 410 (W.D. Mo. 1987). The court provided for additional revenue to be applied toward salary increases it believed necessary to implement the educational improvement programs and to ensure no diminution in their quality. *See id.*

[151] *See Jenkins*, 515 U.S. at 143 (Souter, J., dissenting).

[152] *See id.* at 80.

[153] *See id.*

[154] *See* Jenkins v. Missouri (Jenkins III), 11 F.3d 755, 764–66 (8th Cir. 1993).

[155] *See* Missouri v. Jenkins, 515 U.S. at 83.

[156] *See id.* at 89. *Milliken II*'s broad governing legal principles guiding the school-desegregation remedial process remained substantially unchanged in the 1990s. *See* HASKINS,

with an interdistrict purpose, "desegregative attractiveness,"[157] exceeded its authority to remedy an intradistrict violation.[158] Viewing the salary increases as an integral part of the district court's remedial goal of "desegregative attractiveness," the Court ruled that these increases lacked a sufficient remedial nexus to the previously mandated segregation.[159]

As to the second issue, the State's continued funding of quality improvement programs, the Court ruled that the district court's role was to assess whether the reduction of student achievement attributable to the prior de jure segregation had been remedied to the extent practicable.[160] The Court found that improved achievement on test scores did not constitute a requirement to satisfy *Freeman*'s three-part test for partial unitary status.[161] The Court supported this conclusion with statements to the effect that the State had helped finance rather than implement the quality improvement programs, noting that demographic changes and other external factors independent of de jure segregation could affect the racial composition of the KCMSD's schools.[162]

H. *Assessment of School Desegregation Remedies at the Millennium*

The immediate goal of *Brown I* was to eliminate the state sanctioned separation of public school children on the basis of race.[163] The Court justified its decision, however, not only on equal protection grounds, but also on the premise that racial segregation damaged the self-confidence of African-American students.[164] *Brown*'s call for an integrated education—a goal surpassing the immediate objective of removing state imposed barriers—has been less far reaching than originally hoped due to the inherent nature of race relations in the

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supra note 15, at 159.

[157] *Jenkins*, 515 U.S. at 91.

[158] *See id.* at 89–90.

[159] *See id.* at 100.

[160] *See id.* at 101–02.

[161] *See id.* For a discussion of *Freeman v. Pitts*, 503 U.S. 487 (1992), see *supra* notes 107–09 and accompanying text.

[162] *See Jenkins*, 515 U.S. at 102.

[163] *See* 14 FORTY YEARS AFTER THE *BROWN* DECISION: SOCIAL AND CULTURAL EFFECTS OF SCHOOL DESEGREGATION 425–27 (Charles Teddlie & Kofi Lomotey eds., 1997) [hereinafter FORTY YEARS].

[164] This assumption has come under attack. *See* WOLTERS, THE BURDEN OF *BROWN*: THIRTY YEARS OF SCHOOL DESEGREGATION 283 (1984) ("[B]y the early 1960s the social science research the Supreme Court had cited in *Brown* had been widely discredited."); *see also Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) ("[T]he theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development... relies upon questionable social science research... [and] also rests on an assumption of black inferiority.").

United States.[165]

The benefits stemming from a racially integrated education cannot be achieved solely on the basis of neutral pupil assignments due to residential segregation.[166] The housing market, with its set of discriminatory attitudes and practices, continues to cause residential segregation by race.[167] The proportion of African-American students enrolled in large urban cities increased dramatically over the last two years.[168] Declining white enrollments are attributed to demographic changes and the movement of whites to the suburbs, trends that cannot be reversed by school desegregation plans.[169] The migration, since the

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[165] *See* FELDMAN ET AL., *supra* note 11, at 14; FORTY YEARS, *supra* note 163, at 426–28; JACOBS, *supra* note 39, at 196–99. For statistics substantiating rising poverty among children attending Columbus, Ohio public schools between 1968 and 1986, see JACOBS, *supra* note 39, at 155.

[166] While courts could dictate pupil assignments to alter the relationship between housing and school attendance, they could not control the local residential market, which continued to make race-conscious decisions resulting in the redlining of areas subject to desegregation remedies. *See* JACOBS, *supra* note 39, at 197. The failure of desegregation efforts in Columbus, Ohio to achieve equal educational opportunities, for example, has been attributed to the market's unwillingness to make capital investments in areas served by an inner-city school system undergoing desegregation. *See id.* at 121, 130. The filing in 1973 of the desegregation lawsuit, *Columbus Board of Education v. Penick*, chilled investment in the central city home-building market due to market uncertainty. *See id.* Fearing that the elimination of a predictable neighborhood school assignment would deter prospective home buyers, bankers, developers, and builders chose not to risk their resources on new construction within the boundaries of the Columbus school system. *See id.*

[167] *See* Gary Orfield, *Segregated Housing and School Resegregation*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 308 (Gary Orfield et al. eds., 1996).

[168] *See* FORTY YEARS, *supra* note 163, at 428–29. In the Indianapolis public schools, for example, white students comprised a majority in 1978–79, but by 1995–96 they constituted just 40% of the school population. *See* FIFE, *supra* note 38, at 71. In 1954 blacks accounted for 18.9% of the KCMSD's enrollment, but by 1983–84 they comprised 67.7% of the student population. *See* Missouri v. Jenkins, 515 U.S. 70, 116 (1995) (Thomas, J., concurring). The large nonwhite underclass trapped in the inner cities in the 1990s includes a large Latino population as well as African-Americans. *See* HASKINS, *supra* note 15, at 163. In 1994, a number of years after the implementation of the *Milliken II* remedies in Detroit, 92% of Detroit students were members of racial or ethnic minority groups. *See* FELDMAN ET AL., *supra* note 11, at 19. While Columbus, Ohio's black population increased by 112% between 1950 and 1970, only 15% of the city's African-Americans lived outside of the city's 1950 boundaries. *See* JACOBS, *supra* note 39, at 11.

[169] *See* Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 53, 61–63 (Gary Orfield et al. eds., 1996). Among the demographic reasons for declining white enrollments in city public schools is a decrease in the birth rate of white persons since the 1950s and an increasing in-migration of minorities. *See* TAYLOR, *supra* note 50, at 154. The decline in white school enrollment in the central cities has occurred even in cities that retained neighborhood schools and did not implement busing plans. *See* Orfield,

Brown I decision, of many African-Americans from rural areas in the South to the central cities of the nation's largest metropolitan areas also accounts for demographic changes in urban school districts.[170]

By the 1970s, the Court stressed active measures on the part of school districts to achieve integration through balanced racial enrollments.[171] The Court's *Milliken I* decision to disallow the desegregation of the Detroit schools with the surrounding suburban areas, however, was a turning point that limited the scope of school desegregation and busing.[172] In response, district courts in the 1980s employed voluntary methods to attract white students to attend schools in areas with predominantly minority populations. District court judges expanded their remedial tools to include the creation of magnet schools, providing a particular curricular theme or method of instruction, and other quality improvement programs.[173] These remedies greatly expanded educational costs,

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supra, at 63.

The root cause of resegregation in Kansas City, Missouri since the 1950s cannot be identified precisely. *See* RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS 415 (1996). Affluence, the lure of the suburbs, fear of crime, the desire to live among whites, and apprehension about the quality of inner-city education have been cited as an explanation for white flight. *See id.* The federal government furthered the movement to the suburbs by siting a disproportionate amount of public housing in the city, underwriting home mortgages in the suburbs, and funding roads and other infrastructure improvements outside the city. *See id.* Boston began losing population after World War II and experienced a white flight acceleration in the mid-1970s when school desegregation remedies commenced, but during the 1980s the decline in white residents was lower than it had been in the 1960s. *See* TAYLOR, *supra* note 50, at 152–53. In Columbus, Ohio, federal lending practices and the creation of the interstate highway system accelerated the white exodus from the inner city, pulling jobs and services toward the city's periphery. *See* JACOBS, *supra* note 39, at 10.

[170] *See* FORTY YEARS, *supra* note 163, at 428–29. By the 1970s, African-Americans had become the most urban of the nation's groups. *See id.* at 428. In 1954, blacks lived predominantly in rural areas, but by the 1970s more than 50% of African-Americans resided in urban areas, 37% of them living in the central cities of the nation's largest metropolitan areas. *See id.* at 428–29.

[171] *See* WOLTERS, *supra* note 164, at 3–5. The *Green* decision changed the Court's stance from antidiscrimination, making student assignments without regard to their race, to a policy of required integration, using race as a factor in the assignment of students to schools. *See* RAFFEL, *supra* note 32, at xiv–xv; WOLTERS, *supra* note 164, at 7. The Court's frustration with the implementation of racially neutral school assignments is attributed with causing it to require racial balancing. *See* RAFFEL, *supra* note 32, at xv.

[172] *See* RAFFEL, *supra* note 32, at xv. Busing was resisted throughout the country. *See* WOLTERS, *supra* note 164, at 6–7. It is virtually impossible to achieve integrated education without massive busing that would include the metropolitan area as well as inner city areas. *See* FELDMAN ET AL., *supra* note 11, at 7.

[173] The imposition of the ancillary, quality improvement programs approved by the Court in its *Milliken II* decision cause greater judicial intrusion into the provision of public education than remedies designed to cause desegregation such as busing. *See* Orfield, *supra* note 11, at 3.

leading the federal judiciary to impose fiscal educational mandates upon states and local school districts.

This Article argues that the remedial measures employed by the *Jenkins* district court eroded representative democracy and violated the federal Constitution's separation of powers framework. *Jenkins* presents, nonetheless, the issue of whether the district court's deeply intrusive measures may be justified because the goal of school desegregation warrants judicial action when political will is lacking.[174] In a technological era in which the ability to obtain a quality education holds the key to success, it has been argued that the improvement of schools indeed constitutes a civil rights issue.[175] Although an evaluation of the effectiveness of school desegregation is beyond the scope of this Article, a sufficient amount of time has elapsed from the Court's affirmative action approaches, beginning in the 1970s, to evaluate the strengths and weaknesses of the desegregation remedies.[176]

At the millennium evidence has been gathered proving the value of an integrated education for all children.[177] The influx of African-American students into suburban schools as a result of St. Louis's desegregation plan, for example, caused some educators to change practices that not only alienated black students, but failed to meet the needs of hundreds of white students as well.[178] Discourse in a racially mixed classroom broadens all students' understanding of different cultures, racial issues, and inequality.[179] White students benefit from exposure to multicultural "ways of knowing" and greater opportunities to critique existing societal conditions that build awareness of racial polarization and inner city

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[174] *See* Kalodner, *supra* note 83, at 4 ("[L]itigation is the last and the least but all too frequently the only recourse of those who suffer discrimination at the hands of those who administer our educational systems.").

[175] *See* Orfield, *supra* note 169, at 53–57, 65–71; Ira J. Hadnot, *B. Keith Fulton*, DALLAS MORNING NEWS, June 27, 1999, (Sun. Reader), at 1J (providing an interview with B. Keith Fulton, Director of Technology, National Urban League).

[176] District court judges overseeing the implementation of school desegregation express satisfaction with the results achieved and attribute the lack of complete success to white flight, segregated housing patterns, and insufficient funding. *See* Kalodner, *supra* note 83, at 4–5.

[177] Surveys found the Columbus, Ohio school district, for example, to be healthier in 1985 than it was at the commencement of the *Columbus Board of Education v. Penick* desegregation lawsuit in 1973. *See* JACOBS, *supra* note 39, at 158. Teacher and student attitudes toward desegregation had grown more positive. *See id.* A smaller percentage of people viewed desegregation and busing as the biggest problem facing the Columbus schools. *See id.* Black student performance had continued to increase at all levels and test scores for elementary and middle schools were on the rise. *See id.*

[178] *See* WELLS & CRAIN, *supra* note 37, at 287–88. Implementation of the desegregation plan resulted in enhanced awareness of students' individual needs and served as a catalyst to improve teaching techniques. *See id.* at 288.

[179] *See id.* at 293.

poverty.[180] African-American students who have positive contacts with white students expand their social and work network, making them more successful in earning a livelihood.[181] A recent study found that students who attend racially diverse schools become thoughtful learners and leave better prepared to participate in a heterogeneous society than those attending less diverse institutions.[182] The Court's decision in *Milliken I* to confine all remedial action to the geographical area in which the constitutional violations occurred, however, makes *Brown I*'s goal elusive. Studies show that the greatest amount of integration has occurred in school districts organized on a metropolitan wide basis.[183] The federal judiciary's lack of power to reorganize school districts covering a large area encompassing both predominantly white and minority populations makes racial diversity in the public schools impossible without the cooperation of the affected political subdivisions.

At the time of *Brown I*, many African-Americans believed that integration would improve education for all children by providing the resources to African-American children that previously white children had enjoyed.[184] By eliminating decision making on the basis of race, they hoped that all children would be treated alike in the same environment.[185] But *Brown I*'s nondiscrimination policy did not erase the country's social and economic disparities.[186] When the struggle for

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[180] *See id.* at 289.

[181] Studies have showed that African-American male graduates of integrated high schools are more likely to obtain higher-status jobs and earn higher incomes than African-American graduates who attend segregated schools. *See* HASKINS, *supra* note 15, at 161–62. When black children have positive experiences with white mentors, they are more likely to achieve educational success and befriend whites later in life. *See* SANK POWE, GRIT, GUTS, AND BASEBALL: THE STORIES OF COACH SANK POWE 229 (Beth Boswell Jacks ed., 1996). Interracial mentoring and tutoring programs and integrated education can help forge positive relationships between black and white children and adults. *See id.*

[182] *See Notebook*, CHRON. OF HIGHER EDUC., Mar. 26, 1999, at A51; *see also* Sheff v. O'Neill, 678 A.2d 1267, 1273 (1995) (stating that an integrated public school system benefits all children by eliminating racial and ethnic isolation).

[183] The most integrated metropolitan areas had mandatory city-suburban busing plans. *See* HASKINS, *supra* note 15, at 161. These areas included Louisville, Kentucky; Tampa, Florida; Wilmington, Delaware; Nashville, Tennessee; Greenville, South Carolina; and Greensboro, North Carolina. *See id.*

[184] *See* JACOBS, *supra* note 39, at 18.

[185] *See id.* at 18. It is believed that "most African Americans maintain[ ] a lingering faith in integration, buttressed by the reality of segregation's inevitable economic limitations." *See id.* at 176.

[186] *See* TAYLOR, *supra* note 24, at 177. In the 1990s, a growing number of black mayors in the nation's large cities supported ending busing because racial balance was unachievable in these cities. *See* JACOBS, *supra* note 39, at 188–89. The mayors also believed that busing harmed their cities' economic base. *See id.* In Columbus, Ohio, the district court found that racial problems continued to exist even at the time it terminated its supervision of court-ordered desegregation. *See id.* at 157–58. For example, the discipline rate for black students was far

integrated education failed to meet the expectations engendered by *Brown I*, many African-Americans focused their attention on community control of the public schools.[187] Some African-Americans disagree with the pursuit of racial balance strategies believing that segregated schools do not harm blacks' self-images.[188] In the KCMSD, for example, African-Americans challenged the district court's pursuit of suburban white students to diversify the student body; instead, they believed that integration was far less important than providing quality education for black children.[189]

The quality improvement programs have achieved only limited success.[190] The Harvard Project on School Desegregation studied the effects of *Milliken II*-type programs in Detroit, Michigan; Little Rock, Arkansas; Prince George's County, Maryland; and Austin, Texas. The report concluded that the *Milliken II* remedies were used to supplant, rather than supplement, *Brown I*'s goal of

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higher than the rate for white students at this time. *See id.*

[187] The civil rights movement failed to rid the nation of urban slums, inadequate health care, segregated schools, and black unemployment. *See* TAYLOR, *supra* note 24, at 177. Black power activists criticized attempts to forge an integrated society and advocated community empowerment and control over institutions in the black community to improve the lives of African-Americans. *See id.* In New York City, for example, when the school integration movement ended in 1966 due to inaction on the part of the New York City Board of Education and white resistance to busing, community activists and concerned parents organized to gain the right to hire teachers, shape the curriculum, exercise budgetary control, and negotiate with the unions. *See id.* at 120–23, 157, 180–81. They fought for school decentralization that transferred power from the city's Board of Education to local governing school boards. *See id.* at 180–207 (describing the drive for decentralization, the Ocean Hill-Brownsville crisis stemming from teacher opposition to decentralization, and the 1969 state legislative action relating to decentralization).

[188] *See* HASKINS, *supra* note 15, at 165; WOLTERS, *supra* note 164, at 283.

[189] *See* Anderson, *supra* note 5, at 22. Justice Thomas in his concurring opinion in *Missouri v. Jenkins*, 515 U.S. 70 (1995), criticized the district court's pursuit of racial balance in the KCMSD as resting on the assumption "that blacks cannot succeed without the benefit of the company of whites." *Id.* at 119. He cited several studies criticizing the studies cited in *Brown I* that segregation causes feelings of inferiority. *See id.* at 119–20. In Columbus, Ohio, African-Americans criticized school superintendent Ron Etheridge who resigned in 1990 "for being more concerned with attracting suburban whites than educating urban blacks." *See* JACOBS, *supra* note 39, at 187–88.

[190] In the four districts surveyed, the Harvard Project found no evidence that expensive programming had redressed harms caused by segregation or improved educational opportunities. *See* FELDMAN ET AL., *supra* note 11, at 5. The *Milliken II* ancillary educational programs employed in Detroit, for example, did not come close to eradicating students' educational deficits. *See id.* at 8. Detroit's school enrollment is virtually all African-American in the 1990s despite the extra money spent for the educational programs. *See* Orfield, *supra* note 167, at 315. In Austin, Texas, the school district allocated additional funding and special programs into the most segregated schools and designated these schools as "Priority Schools." *See* FELDMAN ET AL., *supra* note 11, at 10. These "Priority Schools" improved slightly over a six-year period, but remain unequal to other school districts by many measurements. *See id.*

integrated education.[191] The programs served as a tool to extract more financial resources from the state, providing temporary relief, but failing to reverse the effects of past segregation.[192] The educational remedies were viewed as compensation for past discrimination rather than as a means to correct the minority students' educational deficiencies.[193] The study concluded that the array of expensive programs did not fulfill *Milliken II*'s charge to restore the victims of discrimination to the positions they would have achieved in its absence.[194] The study's authors found that no program could make "segregated minority schools fundamentally equal to schools that enroll a racial and economic mix."[195]

The Harvard Project report noted a number of deficiencies in the implementation of the ancillary educational programs. The school districts surveyed failed to incorporate any evaluative tools to measure the success of the remedial programs.[196] The programs were generally ill conceived and

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[191] *See* FELDMAN ET AL., *supra* note 11, at 7, 14.

[192] *See id.* at 19. In Detroit, the city school superintendent, at the time a settlement agreement was reached with the state, characterized the settlement as a way to retain funding for the educational programs as long as possible. *See id.* at 22. Many people viewed the settlement plan in Little Rock, Arkansas as a deal for more money in lieu of mandatory busing. *See id.* at 31.

[193] *See id.* at 8, 14. In Detroit, the inattention given to student performance likely resulted from the view that the compensatory programs served to provide temporary relief rather than to achieve educational equality. *See id.* at 19.

[194] *See id.* at 8, 14. The Little Rock, Arkansas case study, which examined the eight "Incentive Schools" created to provide *Milliken II* relief, found that the programs made scant progress toward restoring the victims of discriminatory conduct to the position they would have occupied in its absence. *See id.* at 8. Little Rock's "Incentive Schools" remain highly segregated. *See id.* Likewise, no evidence shows that the *Milliken II* remedies employed in Prince George's County, Maryland, restored the victims to the positions they would have obtained in its absence. *See id.* at 9.

[195] *Id.* at 10–11.

[196] Six years after the educational components of the Detroit desegregation plan were ordered, the defendants and plaintiffs negotiated a settlement ending the remedies in 1989 without any evidence that the remedies had corrected the plaintiffs' educational deficiencies. *See id.* at 19. The authors of the Harvard Project on School Desegregation were unable to obtain any documentation of evaluations made by the Detroit school district, or by the state, of the effect of the educational improvements made as a result of the *Milliken II* litigation. *See id.* at 25–26.

The case study of the remedial educational programs in Little Rock, Arkansas concluded that no systematic evaluation of the programs had been conducted. *See id.* at 8. A 1985 Memorandum of Understanding reached by the defendant school board in Prince George's County, Maryland and the plaintiff NAACP required the existence of *Milliken II* programs, but made no reference to standards or measurement of success. *See id.* at 41. Some evaluations were made, but the measurements upon which they were based are questionable. *See id.* at 40. Standardized test scores, the principal data used by school authorities to measure the effectiveness of the ancillary programs surveyed in the Harvard Project, cannot measure the effectiveness of a given program or curriculum. *See id.* at 58–59.

unaffordable, with little thought given to future funding for them or achievable outcomes.[197] These programs had the further disadvantage of creating a perception of inequality at the schools that did not receive *Milliken II*-type funding, but faced declining white student enrollments.[198] The Harvard Project argued in favor of greater emphasis upon the achievement of *Brown I*'s goal of integration.[199] It supported further funding for properly designed educational programs, but only if measured outcomes showed that their implementation helps to remedy the effects of past racial discrimination.[200]

The *Milliken II*-type remedies imposed in the KCMSD schools, at a cost of $1.5 billion over an eight year period,[201] achieved only modest success.[202] The KCMSD experienced the same problems reported in the Harvard Project. Clearly, greater educational expenditures in the KCMSD did not translate automatically into improved educational performances.[203] The massive infusion of money into the KCMSD failed, for example, to cause much improvement in student test scores, which continued to remain low after the quality improvement programs were instituted.[204] The plan also failed to attract a significant number of white

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[197] *See id.* at 32. In Little Rock, Arkansas, school officials did not develop a coherent strategy for addressing the educational deficits of minority children by setting achievable outcomes. *See id.* Instead, an assumption was made that expensive techniques and programs would produce results without the need for further thinking. *See id.* at 32–33. Further, the funding and educational elements of the Little Rock desegregation plan were developed separately by two different committees, resulting in an unaffordable program. *See id.* at 33–34. In Prince George's County, additional funds provided to magnet and *Milliken II* schools drew better teachers and more active parents away from the remaining schools, leaving these schools with inadequate leadership and funding. *See id.* at 44.

[198] As non-*Milliken II* schools become more segregated, their representatives seek entitlement to *Milliken II*-type funding. *See id.* at 44. A new kind of inequity is created if funding cannot be provided to schools experiencing a decline in white student enrollments. *See id.* at 45.

[199] *See id.* at 57. The Harvard Project argues that *Milliken II* remedies should not be viewed as a substitute for racial integration. *See id.*

[200] *See id.* at 6.

[201] *See* Morantz, *supra* note 111, at 242. In 1985, prior to the implementation of the desegregation remedies, the KCMSD expenditures per pupil exceeded the statewide average by 10% to 21%. *See id.* at 252. From 1988 to 1993, the KCMSD's per pupil costs were comparable to those in St. Louis and two of St. Louis's wealthy white suburbs. *See id.*

[202] *See id.* at 243, 256–61; William H. Freivogel, *Jewels Shine Amid Failures in Kansas City*, KAN. CITY STAR, May 16, 1994, at B5.

[203] *See* Lynn Horsley, *The Plan: Ambitiously Unrealistic Barriers Overcome, But Others Remain*, KAN. CITY STAR, May 9, 1994, at A1; Barbara Shelly, *Clark Held onto Goals Some Forgot*, KAN. CITY STAR, Jan. 29, 1997, at C1; Stephen W. Winn, *Local Test Scores Prompt Divergent Views on Progress Hard to Believe Everyone Is Talking About the Same District and the Same Test Scores*, KAN. CITY STAR, Mar. 20, 1994, at L1.

[204] Although students at magnet schools performed better on standardized tests than their nonmagnet counterparts, the KCMSD test scores from 1990 to 1993 showed no improvement

students to attend the KCMSD schools.[205] Perhaps a longer time period is needed to measure the effects of the federal judiciary's school desegregation intervention. Even District Court Judge Russell G. Clark expressed great disappointment with the pace and quality of the improvements he ordered in the KCMSD during his oversight in the *Jenkins* lawsuit.[206] The district court's experiment with mandating financial support for the KCMSD that far outstripped the resources of nearby school districts undoubtedly inured to the school district's benefit.[207] However, in 1997, the State was released of its funding obligations leaving the KCMSD with a less secure financial base.[208] Three years later, the Eighth Circuit Court of Appeals reinstated the twenty-three year old lawsuit following a 1999

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in closing the gap between district and Missouri state averages. *See* Morantz, *supra* note 111, at 256–59. The KCMSD scores remained from 10% to 20% below Missouri state averages. *See id.* at 259. Students enrolled in eight magnet schools providing foreign language immersion did score above district averages and national norms. *See id.* at 257; *see also* Mark Bredemeier, Equal Educational Opportunity and Race: School Desegregation in the '90s, Remarks at the Panel I Discussion of the Drake University Law School Fourth Annual Constitutional Law Symposium (Feb. 12–13, 1993) *in*, DRAKE UNIVERSITY LAW SCHOOL FOURTH ANNUAL CONSTITUTIONAL LAW SYMPOSIUM: QUALITY EDUCATION FOR ALL IN THE 21ST CENTURY: CAN WE GET THERE FROM HERE? 1994, at 69–70 (reporting only minimal improvement in student performance); Stephen Chapman, *Sobering Lessons in KC Desegregation Case*, KAN. CITY STAR, June 22, 1995, at C7 (stating that no measurable improvement has been found in student performance on standardized tests in the KCMSD).

In *Missouri v. Jenkins*, the Court rejected strong reliance upon student achievement, as measured by test scores, to assess the success of a desegregation plan. *See* 515 U.S. 70, 101–02 (1995). The Court held that a finding of unitary status or the return of a school district to local control can be found without such student improvement. *See id.*

[205] *See* Deborah E. Beck, Note, Jenkins v. Missouri: *School Choice as a Method for Desegregating an Inner-City School District*, 81 CAL. L. REV. 1029, 1035–36 (1993) (stating that the KCMSD's desegregation remedy attracted less than 750 new white students); *see also* Morantz, *supra* note 111, at 259–60 (noting a slight increase in minority enrollment from the 1986–87 to the 1992–93 school year and no sizable increase in white transfer students after initial implementation stages of the magnet programs, with 66% of entrants staying at least one year after their transfer); Shelly, *supra* note 203, at C1 (stating that a smaller percentage of white students are enrolled in the KCMSD than when the desegregation effort began).

[206] *See* Winn, *supra* note 140, at C7. Judge Russell G. Clark was reported to express disappointment with the district's low test scores and its lack of progress in implementing instructional plans, a security plan, and sound budgeting principles. *See id.* Judge Clark was reported also to have lost confidence in the KCMSD officials. *See id.*; *see also* Stephen W. Winn, *Judge Clark's Despair*, KAN. CITY STAR, Mar. 27, 1997, at C6.

[207] Other jurisdictions resented the state mandated financing of the KCMSD because the district with 4.3% of the state's public school students received twice as high a proportion of the state's funding. *See* RAFFEL, *supra* note 32, at 169.

[208] *See id.* at 169. The release was contingent upon payment of $320 million in desegregation funding over a three year period. *See* Jenkins v. Missouri, 959 F. Supp. 1151, 1169 (W.D. Mo. 1997).

district court order dismissing it.[209]

When the federal judiciary undertakes complex, wholesale institutional reforms, it runs the risk of failing to accomplish its objectives single handedly, thereby impairing the public's expectations and good will.[210] Nonetheless, the judiciary must continue to protect the constitutional rights of minority groups, and it should be mindful that many voters harbor racist sentiments.[211] Every attempt should be made to eradicate discriminatory practices and to clarify the law so that the goal of racial equality can be understood better.[212] In school desegregation lawsuits, the judiciary should engage in a dialogue with the parties to gain support for the remedial reallocation of resources.[213] When elected officials oppose the federal judiciary's remedial measures, judicial reform may not succeed.[214] By undertaking intrusive remedies without sufficient political support or cooperation,

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[209] *See* Jenkins v. Missouri, 73 F. Supp. 2d 1058, 1080–81 (W.D. Mo. 1999) (finding that the vestiges of prior discrimination had been eliminated and relieving the KCMSD of further liability), *rev'd*, Jenkins v. Missouri, Nos. 00-1048, 00-1288, 2000 WL 228296, at *9 (8th Cir. Feb. 29, 2000). The Eighth Circuit ruled that the district court's "sua sponte ruling declaring the district unitary" constituted error. *See Jenkins*, 2000 WL 228296, at *6. The appellate court suggested a more gradual withdrawal of district court supervision prior to a declaration of unitary status. *See id.* at * 8. It further recommended the appointment of another district court judge to preside over the litigation. *See id.* at *9; *see also* Phillip O'Connor, *KC Desegregation Ruling Reversed: Appeals Court Suggests New Judge, Monitors*, KAN. CITY STAR, Mar. 1, 2000, at A1 (praising the state education department for demanding higher standards from the KCMSD and expressing concern about duplicative oversight upon the reinstatement of court-appointed monitoring).

[210] *See* TAYLOR, *supra* note 50, at 204–05. Ordering controversial measures such as busing can generate resistance among the voters. In Boston, Massachusetts, court mandated busing in *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974), not only sparked violence and opposition, but caused the nation to focus attention on school desegregation and busing. *See* RAFFEL, *supra* note 32, at 171. Unable to obtain the cooperation of the Boston School Committee, Judge W. Arthur Garrity, Jr.'s increasing involvement in the day-to-day operations of Boston's public schools led to widespread criticism of the judge and the federal courts. *See id.* The white flight that accompanied the implementation of the desegregation plan raised questions as to the effectiveness of the court's remedy. *See id.* When Judge Garrity excused himself from the case, only 27% of the district's students were white whereas one year before the desegregation plan was ordered the district had a 57% white enrollment. *See id.* at 170–71.

[211] The federal courts may be "the only recourse available to the black community" due to the insulation of federal judges from hostile white voters who are powerless to revoke their life appointments. *See* TAYLOR, *supra* note 50, at 5.

[212] *See id.* at 6 (finding that working class ethnic communities in Boston and Buffalo were indifferent to court mandated busing because the severity of racial discrimination against African-Americans was not understood due to a lack of interaction with blacks).

[213] *See* Diver, *supra* note 4, at 72 (explaining that judicially enforced reductions in existing programs and tax increases marked for new programs can threaten the authority of executive officials).

[214] *See* TAYLOR, *supra* note 50, at 5–6.

the federal judiciary may activate opposing political forces that eventually cause the Court to retreat from its earlier well intentioned stances.[215]

This Article argues that political and community action is needed as well as judicial will to effectuate the reforms needed to improve the educational opportunities of minority school children.[216] A comparison of the history of desegregation in Buffalo and Boston shows that the factors leading to the more successful school desegregation in Buffalo were related to the cooperation the district court received from the Buffalo Board of Education.[217] It should be pointed out, however, that Buffalo officials learned from the failure of Boston's antibusing movement to overturn Judge Garrity's desegregation orders. Realizing that desegregation was inevitable, they cooperated with Judge Curtin and provided input for the desegregation plan developed.[218]

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[215] Judicial intervention to accomplish institutional reform continues to be a heated political issue, and resistance to the judiciary's role in desegregation litigation has moved to other venues as reflected in the intense inquiry made of court nominees to ascertain their judicial philosophy. *See* Barbara Flicker, *The View from the Bench: Judges in Desegregation Cases*, *in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 365, 367 (Barbara Flicker ed., 1990). The most recent bitter controversy between a federal judge and a community occurred in *United States v. Yonkers Board of Education*, 635 F. Supp. 1538 (S.D.N.Y. 1986). *See* Flicker, *supra*, at 367. There, housing segregation issues, rather than the school desegregation orders, provoked political obstruction prompting Judge Leonard B. Sand to impose heavy fines and contempt decrees. *See id.* The Court's most recent retreats from the activist stance it took in *Green*, *Swann*, and *Keyes* are reflected in its 1990s decisions that loosened the requirements for achieving unitary status, namely *Dowell*, *Freeman*, and its 1995 *Jenkins* decision.

The Court's role in legitimizing needed societal changes, however, can prod legislatures and administrators to undertake comprehensive reforms that the judiciary single handedly cannot effectuate. *See* John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133, 1140–41 (1976).

[216] Motivated by concern about political reaction against judges who had implemented school desegregation remedies, the Institute of Judicial Administration surveyed them. *See* Flicker, *supra* note 215, at 366. Many of the judges surveyed, while acknowledging some initial resistance to judicial intervention, found ways to secure cooperation from the officials and other people needed to adopt a desegregation plan. *See id.* Thirty-three percent of the survey respondents indicated open defiance or protest to the judicial process. *See id.*

[217] *See* TAYLOR, *supra* note 50, at 8. This cooperation was related to Buffalo's history of shared power among ethnic groups whereas in Boston the old interethnic tensions between Protestant New Englanders and Irish-Americans caused a distrust of power exercised by any outside elite group. *See id.* at 6–7, 39–40. Other differences existed in Buffalo and Boston that affected school desegregation. In Buffalo, unlike Boston, there were African-American elected officials at the municipal level. *See id.* Buffalo's phase-in of the desegregation remedies was longer than that occurring in Boston, and voluntary remedial measures were first imposed before phasing in mandatory pupil reassignments. *See id.* at 7–8. In Buffalo, the desegregation efforts did not lead to increased white flight. *See id.* at 160. There, white flight was a product of declining birth rates and increased suburbanization, as it was in Boston. *See id.*

[218] *See id.* at 130–31.

Faced with the occurrence of resegregation in some areas, the Court in the 1990s realized that federal judicial supervision would have to be prolonged indefinitely to achieve the racial balances prescribed by some school desegregation decrees. The Court curtailed the requirements for unitary status achievement, thus pulling away from its long-term investment in the local school districts under court order.[219] The Court's 1995 ruling in *Jenkins* eliminated the use of achievement test scores as a measurement for unitary status. This decision also rejected Judge Clark's pursuit of metropolitan wide students from areas not subject to the court's desegregation decrees with the hope of achieving better racial balances in the KCMSD schools. Given this retreat, one may ask why devote attention to the Court's 1990 *Jenkins* decision at all.

Jenkins continues to be a far reaching precedent in several respects.[220] First, the Court's endorsement of extensive remedial programs with unprecedented monetary impacts, set in motion by *Milliken II*, remains in effect.[221] The Court indicated in its 1995 *Jenkins* decision only that more attention should be given to returning schools to local control, thus affirming *Milliken II*'s three-part balancing test.[222] Second, the district court's empowerment to impose judicial taxation and override state law limitations that hinder its desegregation remedial actions remains unquestioned by the Court. Further, *Jenkins*'s judicial taxation and disregard of state law limitations are not confined to the area of school desegregation. In 1999, District Court Judge John Feikens cited *Jenkins* as supporting the power of a federal court to order local governmental taxation to satisfy obligations mandated under a consent decree addressing Clean Water Act violations even if the taxes imposed exceeded state law limitations.[223] Thus, the significance of the Court's 1990 *Jenkins* decision cannot be overlooked despite the Court's willingness to admit some forty-six years after *Brown I* that it has been unable to achieve the aspirations of the generation that fought for this decision. The road to desegregation cannot be fully achieved until racism itself and the conditions of poverty in urban areas are addressed.[224]

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[219] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Board of Educ. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237 (1991).

[220] *Jenkins* has been characterized as the "high-water mark for judicial intervention in local affairs in the course of carrying out a remedial decree." CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION: CASES AND MATERIALS 223 (2d ed. 1992).

[221] In *Liddell v. Special School District*, 149 F.3d 862 (8th Cir. 1998), the court ordered, for example, that after the 1998–99 school year, only one entity was authorized to provide vocational education in the city of St. Louis and the county serving the metropolitan area. *See id.* at 870.

[222] *See* Epstein, *supra* note 87, at 1108 (finding that the 1995 *Jenkins* decision "deals with midcourse corrections, not fundamental changes in direction").

[223] *See* Bylinski v. City of Allen Park, 8 F. Supp. 2d 965 (E.D. Mich. 1998), *aff'd* Bylinski v. City of Allen Park, 169 F.3d 1001 (6th Cir. 1999) (upholding the consent decree as barred by laches without reaching the power to tax issue).

[224] Most commentators agree that solutions to racial segregation in the public schools can

II. HISTORICAL DEVELOPMENTS LEADING TO JUDICIALLY MANDATED TAXATION TO REMEDY CONSTITUTIONAL VIOLATIONS

In its 1990 *Missouri v. Jenkins* decision, the United States Supreme Court extended the federal judiciary's equitable remedies to embrace a taxation order when existing funding sources proved inadequate.[225] The Court upheld the district court's taxation orders to raise revenues deemed necessary to carry out a remedial school desegregation plan irrespective of state law limitations that barred the taxation.[226] The Court endorsed the principle that taxation should be ordered only after the exhaustion of all other permissible alternatives to remedy the constitutional violations at issue.[227] This Part explores the precedents that laid the ground work for this ruling. It analyzes the remedial funding and taxation at issue in *Jenkins* in both the lower federal courts and in the Supreme Court. The majority opinion and Justice Kennedy's concurring in part opinion are reviewed. Part VII further critiques the standards set forth in these precedents, including *Jenkins*, for determining upon what conditions judicial taxation may be ordered to correct constitutional violations.

A. *Early Supreme Court Rulings on the Judicial Power to Order Taxation*

An examination of the precedent that provided the foundation for *Jenkins*'s extraordinary taxation remedy may prove helpful. In an 1874 decision, the Supreme Court emphatically declared that the judiciary does not possess the power to impose taxation upon the citizenry.[228] This principle has been consistently upheld.[229] In the latter half of the nineteenth century and the early

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only be found by understanding the complex legal, social, political, and educational issues involved in school desegregation. *See* RAFFEL, *supra* note 32, at xxii. District Court Judge Robert M. Duncan, Ohio's first African-American federal district court judge, who oversaw court-ordered remedial desegregation in Columbus, Ohio in the *Penick* lawsuit, expressed the view that "courts were ill suited to deal effectively with the complexity of racial segregation in America." *See* JACOBS, *supra* note 39, at 57. He criticized the failure of governmental bodies to address pressing social and racial problems, thereby necessitating court intervention. *See id.*

225 *See* Missouri v. Jenkins, 495 U.S. 33, 55 (1990).

226 *See id.* at 56–57.

227 *See id.* at 51.

228 *See* Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655, 660–61 (1874) (refusing to use the Court's equitable powers to order taxation to provide a remedy for holders of delinquent bonds issued by local levee commissioners because taxation is a legislative power and judicial taxation invades the state government's legislative functions); *see also* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the judiciary possesses "neither FORCE nor WILL but merely judgment" and "has no influence over either the sword or the purse").

229 In *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 817 (1989), the Supreme Court held that a Michigan law that exempted state retirement benefits from taxation, but taxed

twentieth century, the Court upheld, however, judicial orders directed at local governmental units to levy taxes for the purpose of raising revenue to retire outstanding bonds issued or guaranteed by them. In these so-called "bond cases," local governments defaulted on bond principal and interest payments, and the Court sought to enforce under the Contract Clause[230] the pledge made by the localities to make these payments.[231] In each of these cases, the Court ordered a local governmental unit to use its taxation powers to comply with the clear Contract Clause command.

B. *Evolution of Federal Court-Ordered Taxation to Fund School Desegregation Remedies*

1. Griffin v. County School Board

In *Jenkins*, the Court relied most heavily upon its earlier decision in *Griffin v. County School Board*. The *Griffin* litigation originated from resistance by Prince Edward County's Board of Supervisors to comply with the 1954 *Brown v. Board of Education* decision. When confronted with a court decree to integrate its public schools, the County Supervisors refused to levy any school taxes for the 1959–60 school year. This decision ultimately led to the closure of all of the county's schools and the opening of private schools for white children.[232] The plaintiffs rejected an offer to fund private education for African-American children, preferring to proceed with their public school desegregation efforts.[233] As a result, African-American school children did not receive any formal education in Prince

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federal retirement benefits, violated the principles of intergovernmental tax immunity. The Court refused, however, to order the elimination of the tax exemption for state employees. *See id.* at 818. This proposed action was characterized as a "remedy beyond the power of a federal court." *Id.*; *see also* Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 752 (1961) (finding that federal courts lack power to assess or levy state taxes to replace state taxes declared invalid); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 932–33 (1998) (arguing for greater flexibility than that demonstrated by the *Davis* court in defining what state practices discriminate against federal institutions).

[230] U.S. CONST. art. I, § 10, cl. 1.

[231] In *Missouri v. Jenkins*, 495 U.S. 33, 55–56 (1990), the Supreme Court cited the following bond cases: Louisiana *ex rel.* Hubert v. Mayor of New Orleans, 215 U.S. 170 (1909); Graham v. Folsom, 200 U.S. 248 (1906); Wolff v. New Orleans, 103 U.S. 358 (1881); United States v. New Orleans, 98 U.S. 381 (1879); *Heine*, 86 U.S. (19 Wall.) at 657; City of Galena v. Amy, 72 U.S. (5 Wall.) 705 (1867); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1867); Board of Comm'rs of Knox County v. Aspinwall, 65 U.S. (24 How.) 376 (1861).

[232] *See* Griffin v. County Sch. Bd., 377 U.S. 218, 222–23 (1964).

[233] *See id.* at 223.

Edward County from 1959 to 1963.[234]

In 1960, Virginia's General Assembly revised a tuition grant program to provide funding for both white and African-American students to attend nonsectarian private schools or public schools. The Prince Edward County Supervisors enacted an ordinance authorizing tuition grants pursuant to this program and further authorized property tax credits for contributions to private schools. These actions helped to support private schools, and the County's public schools continued to remain closed.[235] The Supreme Court agreed with a district court ruling that closing the public schools in Prince Edward County while public schools were open in all other Virginia counties denied African-American students the equal protection of the laws under the Fourteenth Amendment.[236] The Court believed that opposition to school desegregation fueled the closing of the county's public schools.[237] The Court upheld the district court's remedial decree that barred county tax credits or tuition grants so long as its public schools remained closed.[238] It further held that the district court could require the local taxing authority to levy taxes to provide for the re-opening of public schools that closed to avoid school desegregation.[239]

2. United States v. Missouri

After *Griffin*, other courts, grappling with financing issues raised by school desegregation implementation, began to express the view that the judiciary possesses the power to order taxation to provide necessary remedial funding. In *United States v. Missouri*,[240] the Court of Appeals for the Eighth Circuit first stated, in dicta, that district courts "[have] the authority to implement . . . desegregation order[s] by directing that provision[s] be made for the levying of taxes essential to the operation of [a] school district."[241] The court ruled, however, that deference should be given to state and local estimates of the anticipated amount of funds available to carry out the desegregation plan.[242] It upheld the rate of taxation recommended by the State to effectuate the desegregation plan, an amount authorized by state law.[243] The appeals court

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[234] *See id.*

[235] *See id.* at 223–24.

[236] *See id.* at 225.

[237] *See id.* at 231.

[238] *See id.* at 232–33.

[239] *See id.*

[240] 515 F.2d 1365 (8th Cir. 1975).

[241] *See id.* at 1372–73.

[242] *See id.* at 1373.

[243] *See id.*; *see also* United States v. Missouri, 388 F. Supp. 1058, 1059 (E.D. Mo. 1975). The district court, after ordering the consolidation of three school districts, ordered that the tax rate, which was to be uniform throughout the new district, be set at $6.03 per hundred dollars of

rejected the district court's order to set the tax levy at a rate higher than the level authorized by the voters pursuant to state law.[244]

3. Evans v. Buchanan

Shortly after the Eighth Circuit's decision in *United States v. Missouri*, the difficulty of setting a tax rate sufficient to fund a desegregation plan that did not violate state law limits became apparent in Wilmington, Delaware in *Evans v. Buchanan*.[245] In *Evans*, the district court's desegregation plan encompassed the reorganization of eleven school districts into one school district.[246] At first the state legislature refused to enact a statutory governance framework to devise a tax rate for the new single school district.[247] The district court then proceeded to transfer authority to a new five-member board, appointed by the State Board of Education as ordered by the court, charged with the duty to develop a desegregation plan and to govern the school system.[248] The court ordered this board, the New Castle County Planning Board of Education (NCCPBE), to establish a tax rate for the single school district created.[249] In devising the new district, the court attempted to follow state law to the extent possible, but admitted that the successful operation of the single district would not conform to existing statutes, if literally applied.[250]

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assessed valuation, a rate in excess of that permitted by the Missouri Constitution without a two-thirds vote of the electorate. *See id.* at 1060. The district court had received testimony that such tax rate was deemed necessary to operate a desegregated system and "that there was no reasonable possibility that such a tax levy would be approved by the required two-thirds vote in the aftermath of a desegregation order." *Id.* at 1059. The district court's order stated that the $6.03 tax rate "shall be deemed to have been approved by the voters for the purposes of... [the] Missouri Constitution." *Id.* at 1060.

The Eighth Circuit in *United States v. Missouri*, 515 F.2d 1365, 1372–73 (8th Cir. 1975), opined that the district court's remedial powers were not limited by state law. Nevertheless, this court set the tax rate at $5.38 per hundred of assessed valuation, an amount authorized under state law, because it thought deference should be given to the state officials' belief that the $5.38 tax rate would be adequate with the receipt of anticipated funds from the state legislature. *See id.* at 1373.

[244] *See Missouri*, 515 F.2d at 1373.

[245] 447 F. Supp. 982 (D. Del. 1978).

[246] Each of the 11 school districts before consolidation had disparate tax rates, and the equalization of per pupil expenditures required a tax increase in 10 of the 11 districts. *See id.* at 1025.

[247] *See* Evans v. Buchanan, 455 F. Supp. 715, 717 (D. Del. 1978); *Evans*, 447 F. Supp. at 1035.

[248] *See Evans*, 447 F. Supp. at 988.

[249] *See id.* at 1035. "[The Board's] primary responsibilities were to develop a complete desegregation scheme and to prepare and plan for the assumption of authority over the school system." *Id.* at 988.

[250] *See id.* No state legislation had been enacted to take cognizance of the operation of a

The district court in *Evans* thus chose to order the implementation of the remedial single-district desegregation plan without waiting for the state legislature to pass enabling legislation. The State Board of Education advocated delaying the remedial plan until the legislature provided a legal framework for the unitary district, but the court considered this proposal impractical.[251] Another option existed: scale down the remedial plan to accomplish only those objectives permitted by state law. Instead, the court empowered the NCCPBE to carry out the remedial plan, following state law to the extent possible.[252] The Court authorized the NCCPBE to set a tax rate, but invited the legislature to raise or lower this rate provided the rate enabled the desegregation process to proceed without peril.[253] This action prompted the legislature to pass legislation that changed the court's remedial plan by replacing the court-ordered single district with four districts and providing a mechanism for each of the four districts to establish a tax rate.[254] The State Board of Education immediately set a maximum tax rate for each of the new school districts.[255]

The district court enjoined the creation of the four districts,[256] and also invalidated the tax rate set by the State Board of Education, a rate lower than that

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large unitary district by the New Castle County Planning Board of Education. *See id.*

[251] *See id.* at 1035.

[252] *See id.*

[253] *See id.* at 1026. The court recognized and sought justification for its legislative action, stating:

> [T]he goal of nondiscriminatory public education . . . has not reached fruition. All the foregoing problems articulated by the Supreme Court, and more, have been at issue in this enduring litigation. The Court has looked for guidance to each of the equitable considerations enumerated by the Supreme Court, devoting particular attention to local needs and the importance of reconciling public and private interests. Now the promise of *Brown* is in sight; implementation is near and the constitutional infirmity . . . will at least receive treatment.

Id. at 1040 (citation omitted).

The *Evans* court cited *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955), as authority for the "foregoing problems." *See Evans*, 447 F. Supp. at 1040. Those problems included those "related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." *Brown II*, 349 U.S. at 300–01.

The *Evans* court stated that "political processes [were] preferred over even limited intervention by a federal court." *Evans*, 447 F. Supp. at 1026.

[254] *See* Evans v. Buchanan, 455 F. Supp. 692, 695 (D. Del. 1978).

[255] *See id.*

[256] *See id.* The district court enjoined the implementation of the four-district plan as conflicting with its January 9, 1978 order, and the injunction was not contested on appeal. *See* Evans v. Buchanan, 582 F.2d 750, 775 n.21 (3d Cir. 1978).

established by the NCCPBE for the new school district.[257] This tax rate, according to the court, frustrated the remedial process designed to vindicate constitutional rights.[258] The Court of Appeals for the Third Circuit, however, vacated the district court's order and ruled that the district court erred in refusing to grant the usual presumption of legislative regularity to the legislature's taxation framework.[259] It directed the district court to conduct a new hearing at which the usual deference to the legislature's tax policy was to be in place.[260]

By deferring to Delaware's taxation policy, the Third Circuit took a position directly at odds with the 1990 *Jenkins* decision. The court did not believe that the judiciary, in devising remedies to correct constitutional violations, possesses an inherent power to disregard the usual deference accorded to legislatures in taxation matters.[261] The court gave several reasons for granting presumptive validity to the existing state taxation policy. First, it characterized judicial taxation as violative of "two venerable maxims of the American tradition: '[t]axation without representation is tyranny' and 'the power to tax involves the power to destroy.'"[262] It also found that the district court had failed to accord sufficient weight to the following: (1) the legislature's greater understanding of local conditions, (2) the traditional respect for a separation of powers among the branches of government, and (3) the judiciary's longstanding adherence to legislative presumptive validity as a guiding principle of judicial review needed to preserve the legislative branch's independence and ability to function.[263]

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257 *See Evans*, 455 F. Supp. at 703.

258 *See id.* at 698–99. The court ruled that it had inherent power to "[assure] the collection of adequate funds to effectively operate a racially nondiscriminatory unitary school system." *Id.* It also found that the usual presumption of deference to a legislature's tax policy did not mandate acceptance of the state board of education's tax rate. *See id.*

259 *See Evans*, 582 F.2d at 778–79.

260 *See id.* at 779. The district court in a later opinion stated that the appellate court had ordered it to do the following:

> (1) vacate the May 5, 1978 order; (2) enter an order preliminarily enjoining a tax rate of $1.68 [the rate adopted by the New Castle County Planning Board of Education] and requiring the NCCBE [sic] to impose a tax rate of $1.585 [the level set by the state board of education]; and (3) conduct a new hearing in accordance with the Court of Appeals' opinion.

Evans v. Buchanan, 468 F. Supp. 944, 947 (D. Del. 1979).

261 *See Evans*, 582 F.2d at 778.

262 *Id.* at 777; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) (invalidating a state tax on banks not chartered by the state and stating "[t]hat the power to tax involves the power to destroy"). *But see* ELY, *supra* note 14, at 85–86 (noting that the burdensomeness of a tax is a critical factor in determining its destructive propensities and arguing that the Court in *McCulloch* was ensuring protection of the banks that lacked representation).

263 *See Evans*, 582 F.2d at 777–78.

When the district court reheard the issue of the legality of the state established tax rate, it characterized the issue as whether "the tax rate so strip[ped] the [county school district] of financial support that the unconstitutional intent to thwart desegregation decrees may be inferred as a matter of law."[264] A second issue was whether the state arrived at its tax rate in bad faith.[265] The court resolved both issues in the negative,[266] and opined that the record did not present an extreme case such as *Griffin*.[267]

4. Liddell v. Missouri

Following *United States v. Missouri*, the Eighth Circuit Court of Appeals, first in *Liddell v. Missouri*[268] and then in *Jenkins v. Missouri*, continued its activist approach to judicial taxation. In Missouri, court-directed desegregation plans in St. Louis (*Liddell*) and in Kansas City (*Jenkins*) faced state constitutional funding limitations.[269] The Missouri Constitution provided that bond issues to finance capital improvements required a two-thirds voter approval.[270] During a twenty-four year period preceding the *Liddell* lawsuit, voters in St. Louis defeated thirteen proposed bond issues and authorized only one.[271]

In *Liddell*, the district court ruled, in 1983, that it possessed the authority to order the Board of Education of the City of St. Louis (City School Board) to increase its tax rate by an amount necessary to fund the city's share of implementing a settlement plan that imposed costs upon both the state and the

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[264] *Evans*, 468 F. Supp. at 951.

[265] *See id.* at 951–52.

[266] The court characterized these inquiries as controlling legal principles. *See id.* at 951–52.

[267] *See id.* at 952. The court stated, however, that the "[b]urden of proof should not be confused with standard of review" and concluded that the standard of review could exceed the rational basis test because the state legislation had been enacted in response to a Fourteenth Amendment, remedial desegregation decree. *See id.* at 950.

[268] For a discussion of the *Liddell* case, see D. Bruce La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, *in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 233 (Barbara Flicker ed., 1990).

[269] *See* MO. CONST. art. VI, § 26(a) (limiting indebtedness to the amount of annual income and revenue); MO. CONST. art. VI, § 26(b) (requiring a two-thirds majority vote to authorize bond issues to finance capital improvements); MO. CONST. art. X, § 11(b)-(c) (imposing limitations upon local tax rates). The tax limitation provisions of MO. CONST. art. X, § 11(c) at issue in *United States v. Missouri* involved a plan to desegregate the Kinloch School District No. 18. *See* United States v. Missouri, 515 F.2d 1365, 1371–73 (8th Cir. 1975).

[270] *See* MO. CONST. art. VI, § 26(b); *see also* Liddell v. Missouri (Liddell VII), 731 F. 2d 1294, 1300 & n.5 (8th Cir. 1984).

[271] *See Liddell VII*, 731 F.2d at 1318. Approval of the one bond issue occurred after resubmission to the voters. *See id.*

city.[272] The court specifically authorized and ordered the City School Board not to reduce its operating tax levy as otherwise required by Missouri law (Proposition C) in order to finance the court-supervised settlement plan.[273] The Eighth Circuit Court of Appeals in *Liddell VII*[274] affirmed the district court order and stated: "We hold that the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative."[275] The Eighth Circuit Court of Appeals found the district court's order to be deficient, however, because it failed to make findings that no other fiscal alternatives were available.[276] The Eighth Circuit Court of Appeals illustrated what it meant by exhaustion of alternative sources of revenue to fund the desegregation order. It listed the following three possible alternatives: (1) submission to the voters of a referendum for an increased operating levy, (2) state legislature authorization for the City School Board to impose nonreal estate taxes within the city, or (3)

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[272] *See* Liddell v. Board of Educ., 567 F. Supp. 1037, 1052 (E.D. Mo. 1983). The Court of Appeals in *Liddell v. Missouri* (*Liddell VI*), 717 F.2d 1180, 1182–84 (8th Cir. 1983) denied a motion to stay implementation of the plan with a few exceptions. The settlement plan, which had been approved by the *Liddell* plaintiffs, the *Caldwell* plaintiffs, the City of St. Louis Board of Education, and by all 23 school districts in St. Louis County, as well as the court, provided for (1) voluntary interdistrict transfers of students between city and suburban schools, (2) improvements to the quality of education in St. Louis schools, (3) the creation of magnet schools, and (4) special educational improvements in all-black schools. To finance the plan, it provided that the state would be responsible for the costs of voluntary interdistrict transfers, magnet schools, and alternative integration programs. The state was to pay one-half the cost of the programs to improve the quality of city education, and one-half of the cost of capital improvements. The City Board was required to pay for the remaining costs. *See id.* at 1181–82. Estimates of the first year costs of the plan ranged from $37,000,000 to over $100,000,000. *See Liddell*, 567 F. Supp. at 1051.

The plan specifically provided that the court would enter an order to increase the property tax rate in the city of St. Louis by an amount necessary to fund the city board's share of the plan. *See Liddell VI*, 717 F.2d at 1183. The court of appeals barred such an order until further order from it, but approved the plan's provision that directed the city board not to undertake tax rate reduction as required under Missouri law. *See id.* at 1183–84.

[273] *See Liddell*, 567 F. Supp. at 1056. In 1982, Missouri voters approved a referendum, known as Proposition C, which "directed local school officials to reduce their operating levies by an amount equal to fifty percent of the revenues local school districts would receive under a one-cent increase in the state sales tax." *Liddell VII*, 731 F.2d at 1319; *see also* MO. REV. STAT. § 164.013 (Supp. 1994).

[274] 731 F.2d 1294 (8th Cir. 1984).

[275] *Liddell VII*, 731 F.2d at 1320.

[276] *See id.* at 1323. The Eighth Circuit stressed the necessity for district court findings prior to the issuance of any tax levy increase orders. First, the Eighth Circuit imposed a finding, preceded by a determination of the amount necessary to fund the desegregation order, that the school district lacks sufficient resources to finance the desegregation order, and, if so, a finding that no other alternatives can provide the necessary funding. *See id.*

agreement between the City School Board and the state on alternate methods to raise the board's share of costs.[277] Thus, under the *Liddell VII* "no alternative" test, [278] the litigants work within the existing tax structure until the state legislature demonstrates its refusal to authorize a requested alternative funding plan found necessary to fund the decreed desegregation remedies.

The Eighth Circuit Court of Appeals also made implementation of the no alternative test a condition precedent to any orders that disregarded state law limitations upon capital financing.[279] It upheld, in *Liddell VII*, the district court's refusal to order a tax increase to fund capital improvements until voters acted upon the proposed bond issue, covering an amount determined sufficient to meet capital improvement needs by the City School Board.[280] The City School Board held a bond issue election on November 8, 1983, in response to the district court's order to finance the Board's share of capital improvements under the settlement plan, but the $63.5 bond issue failed.[281] The Eighth Circuit then ordered in *Liddell VII* that a new bond issue be submitted to the voters after the City School Board more carefully identified the projects covered, as well as their cost.[282] The court further instructed the district court to provide directions for capital improvement funding should the next voter submission meet defeat.[283] This bond issue also failed.[284]

In *Liddell VIII*,[285] the Eighth Circuit ordered that a smaller bond issue of twenty million dollars be submitted to the voters.[286] The City School Board rejected this directive and submitted a larger bond issue that also met voter

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[277] *See id.*

[278] *See id.*

[279] After voter rejection of several bond issues to finance capital improvements, the district court refused to authorize the city board to ignore the two-thirds vote requirement for bond issues and directed the board to use other funds available to finance its share of the cost of needed capital improvements. *See* Liddell v. Board of Educ., 674 F. Supp. 687, 722–26 (E.D. Mo. 1987). The court stated that it "[was] convinced that the City Board [had] within its means the funds necessary for its share of the capital improvements program." *Id.* at 726.

[280] *See Liddell VII*, 731 F.2d at 1322. In *Liddell v. Missouri* (*Liddell VI*), 717 F.2d 1180, 1183 (8th Cir. 1983), the court, in refusing to stay the implementation of the settlement plan, indicated that if the bond issue proposal submitted to the voters should fail, the district court should defer action or alternative measures until further order of the court of appeals.

[281] *See Liddell VII*, 731 F.2d at 1318–19. The bond issue received a 55% voter approval. *See id.* at 1319.

[282] *See id.*

[283] *See id.*

[284] *See* Liddell v. Missouri (Liddell VIII), 758 F.2d 290, 302 (8th Cir. 1985). The City School Board rejected the Eighth Circuit's advice and issued another large bond issue. *See id.*

[285] 758 F.2d 290 (8th Cir. 1985).

[286] *See id.* at 302. The state was to match the $20,000,000 bond issue by an equal amount. *See id.*

rejection.[287] When the City School Board asked to be exempted from the two-thirds vote required for capital improvements financing, the district court refused to override the Missouri Constitution. The court stated that "[t]his court is not prepared to begin carving out judicially mandated exemptions to state statutes in which constitutionality is not at issue."[288] The court indicated that the exorbitant amount of the bond issues likely led to the failure to obtain the two-thirds voter approval required.[289]

The lengthy *Liddell* litigation illustrates the Eighth Circuit's assertion of its power to override state law limitations upon taxation and capital financing deemed necessary to effectuate a desegregation plan. Realistically, it shows an unwillingness to disregard these limitations until exhaustion of all other sources of financial relief occurs. The court ordered the City School Board to undertake numerous bond issue submissions. Yet, it chose not to disregard voter sentiment and ordered the City School Board to find other ways to finance its capital improvements when voters rejected the bond issue submissions. It ruled that limitations upon taxation powers such as Proposition C could not be ignored until the district court made a finding that alternative sources of funding did not exist.[290] Nonetheless, *Liddell VII* does support judicial taxation when state law limitations block the funding deemed necessary to finance a school desegregation plan.[291]

5. Jenkins v. Missouri

a. Jenkins *in the Lower Federal Courts*

In Part I of this Article, the initiation of the *Jenkins* case was presented as well as the scope and cost of the remedies ordered by District Court Judge Clark. This Part discusses the funding plan and the taxation ordered by the court to finance the KCMSD's share of the school desegregation costs. With a budget

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[287] *See* Liddell v. Board of Educ. (Liddell IX), 801 F.2d 278, 284 (8th Cir. 1986).

[288] Liddell v. Board of Educ., 674 F. Supp. 687, 722 (E.D. Mo. 1987).

[289] *See id.* at 722–23.

[290] *See* Liddell v. Missouri (Liddell VII), 731 F.2d 1294, 1322–23 (8th Cir. 1984).

[291] The Eighth Circuit Court of Appeal's tax authorization rationale relied upon the rights maximizing cases of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1977), *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), and *Griffin v. County School Board*, 377 U.S. 218 (1964). *See Liddell VII*, 731 F.2d at 1320. The court opined that the *Griffin* Court endorsed judicially ordered tax increases by its omission of an order to set the tax rate at its previous level and its direction to fund the school system at a level adequate to reopen and maintain schools without racial discrimination. *See id.* The Eighth Circuit also cited cases upholding taxation orders to enforce municipal bond commitments protected by the Contract Clause and judicial orders to ensure payment for municipal torts even if the tort liability exceeded constitutional or statutory debt limits. *See id.* at 1322.

inadequate to finance its share of the remedial plan, the KCMSD needed to increase its revenues by additional property tax levies. In many states, constitutional and statutory provisions restrict the amount of taxes that a state or local entity may levy, and Missouri is among them.[292]

Several state law limitations impeded the KCMSD's ability to finance its allocated portion of the desegregation costs. First, the Missouri Constitution limited real property taxes that the KCMSD could levy to $1.25 per $100 of assessed valuation unless the voters approved a higher percentage.[293] In 1969 voters had approved, however, a total levy of $3.75 per $100 of assessed valuation for the KCMSD.[294] Second, the "Hancock Amendment" required property tax rates to be rolled back upon the assessment of property at a higher valuation to ensure that taxes would not be increased as a result of the reassessment of the value of real estate.[295] Third, "Proposition C," allocating one cent of every dollar raised by the state sales tax to a schools trust fund, required school districts to reduce property tax levies by an amount equal to 50 percent of the previous year's sales tax receipts in the district.[296] The adjustments required under Proposition C reduced the KCMSD's operating levy from $3.75 to $3.26.[297]

The district court, citing *Liddell VII* as authority, on June 14, 1985, enjoined the tax levy rollback required by Proposition C to help finance the KCMSD's portion of remedial costs for the ensuing fiscal year.[298] The court stated that time

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[292] *See* M. David Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond*, 63 MINN. L. REV. 545, 551–52 (1979) (explaining the origin of taxation limits in the 1870s and 1880s as a check upon the growth of public expenditures and resulting tax burdens).

[293] A majority vote was needed to raise the levy to $3.25 and a two-thirds vote was necessary to raise the levy above $3.25 per $100 of assessed valuation. *See* MO. CONST. art. X, §§ 11(b)-(c). The district court noted that the likelihood of a two-thirds voter approval was unlikely. *See* Jenkins v. Missouri, 639 F. Supp. 19, 44 (W.D. Mo. 1985).

[294] *See* Jenkins v. Missouri (Jenkins II), 855 F.2d 1295, 1312 (8th Cir. 1988). The levy was later reduced due to the operation of state law limitations. *See id.* In *Jenkins v. Missouri*, 672 F. Supp. 400, 413 (W.D. Mo. 1987), the court stated that the KCMSD then had a tax levy of $2.05 per $100.00 of assessed valuation.

[295] *See* MO. REV. STAT. § 137.073.2 (Supp. 1994). The provisions of the Missouri Constitution, Article X, sections 16–24 are referred to as the Hancock Amendment. Not at issue in *Jenkins* was the Hancock Amendment's restriction upon new or increased taxation. *See* MO. CONST. art. X, § 22 (prohibiting Missouri's political subdivisions from levying new taxes, licenses, or fees or increasing the current levy of an existing tax, license, or fees without approval of a majority of voters).

[296] *See* MO. REV. STAT. § 164.013.1 (Supp. 1994).

[297] *See Jenkins*, 639 F. Supp. at 44. Proposition C diverted nearly one-half of the sales taxes collected in the KCMSD to other parts of the state. *See Jenkins II*, 855 F.2d at 1312.

[298] *See Jenkins*, 639 F. Supp. at 45.

constraints prevented it from presenting a proposal to the voters for additional tax levies and noted the unlikelihood of voter approval for such a proposal.[299] In *Jenkins I*, the Eighth Circuit Court of Appeals did not specifically review the tax rollback order, but appeared to affirm it by stating that the remedy ordered by the district court should be fully funded while acknowledging its placement of greater desegregation costs upon the KCMSD.[300]

On September 15, 1987, the district court rendered several taxation orders to increase the funding available to the KCMSD. These orders became controversial due to their scope and lack of authorization by the state legislature. The district court ordered the levy of a 1.5% Missouri state income tax surcharge on income earned in the KCMSD by both residents and nonresidents. Judge Clark characterized the tax as equitable because evidence showed that the potential taxpayers included a number of people who moved outside the district to avoid desegregation costs, but continued to work in the district.[301] The district court also ordered a tax levy of $1.95 per $100 of assessed valuation, thereby raising the KCMSD's existing levy of $2.05 per $100 assessed valuation to $4.00 per $100 assessed valuation.[302] To complete the financing package, the district court directed the KCMSD to issue capital improvement bonds in the amount of $150,000,000.[303]

On appeal in *Jenkins II*, the Eighth Circuit Court of Appeals upheld the scope of the district court's capital improvement programs[304] and its property tax

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[299] *See id.* at 44–45.

[300] *See* Jenkins v. Missouri (Jenkins I), 807 F.2d 657, 686 (1986). The Eighth Circuit Court of Appeals ordered an equal division of the remedial desegregation costs between the state and the KCMSD. *See id.* In *Jenkins II*, the court stated: "[s]hould the funds that KCMSD can provide for desegregation expenses . . . fall short, the remainder must be paid by the State, as the orders of the district court have imposed joint and several liability on the State and KCMSD." 855 F.2d at 1316.

[301] *See* Jenkins v. Missouri, 672 F. Supp. 400, 412 (W.D. Mo. 1987) (stating that "[d]uring the hearing on the liability issue in this case there was an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to integrate its schools"). The income tax surcharge raised the rate on individuals from 6% to 7.5% and was to be imposed on "residents and nonresidents of the KCMSD, including business associations, partnerships and corporations who earn salaries, wages, commissions and all other compensation and income subject to the Missouri State Income Tax for work done, services rendered and business or other activities conducted within the KCMSD." *Id.* The proceeds of the surcharge were to be used to pay the principal of and interest on the KCMSD capital improvement bonds. *See id.* at 413.

[302] *See id.* at 413. This tax increase was done without voter approval as required by the Missouri Constitution. *See* MO. CONST. art. X, § 11(c). The court estimated that this tax levy increase would provide an additional $27,000,000 annually that could be used to fund the desegregation costs. *See id.*

[303] *See id.* In *Jenkins II*, the court stated that the KCMSD's bond issue had been sold. *Jenkins II*, 855 F.2d at 1306.

[304] *See Jenkins II*, 855 F.2d at 1306. This approval did not extend to the second phase of

increase,[305] but directed that the school district, rather than the district court, make future tax levy submissions to tax collection officials.[306] The new tax levy procedure called for the district court (1) to establish the maximum tax levy permitted,[307] (2) to authorize the school board to present a proposed tax levy to the collection authorities, subject to the district court limit, and (3) to enjoin the application of Missouri constitutional and state law limits to the extent the district court deemed these restrictions reduced or limited the tax below the amount necessary to fund the desegregation remedies.[308] The Eighth Circuit opined that this procedure allowed for more local input.[309]

The Eighth Circuit struck down the income tax surcharge because, unlike the tax levy, it did not constitute "the established source of revenue for Missouri school districts. . . ."[310] The court stated that the income tax surcharge "invaded the province of the legislature . . . and . . . [was] beyond the power of the district court as outlined in *Swann*. . . ."[311] The court interpreted precedent to support the removal of state law limitations that impeded the school desegregation remedial process only when accompanied by adequate deference to local tax collection procedures and the views of state and local officials.[312] The ordered income tax surcharge failed to do so because it restructured the state's methods of financing schools by creating a new form of taxation.[313]

Although the Eighth Circuit upheld court-ordered property tax increases, it noted the limitations on a district court's remedial powers.[314] The court further cautioned that the federal judiciary should use "minimally obtrusive methods to remedy constitutional violations."[315] It ordered the district court to defer to local tax collection procedures and the views of state and local officials, to the extent

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the capital improvement program, estimated to cost between $200 and $300 million. *See id.*

[305] *See id.* at 1311.

[306] *See id.* at 1314.

[307] *See id.* The court of appeals cautioned that the district court should consider the tax levy rates in neighboring areas before setting the maximum rate. *See id.*

[308] *See id.*

[309] *See id.* The Eighth Circuit thought that the district court's role should be limited to setting the maximum tax rate that could be imposed and enjoining the enforcement of state law limitations upon tax levies. *See id.*

[310] *Id.* at 1315.

[311] *Id.* (citations omitted). For a discussion of *Swann v. Charlotte-Mecklenburg Board of Education*, see *supra* notes 39–52 and accompanying text.

[312] *See Jenkins II*, 855 F.2d at 1315.

[313] *See id.*

[314] *See id.* at 1299–1300. The Eighth Circuit stated that a balancing process should guide the choice of remedies to redress racial discrimination and referred to the three-part test in *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 280–81 (1974), as the controlling guideline for the district court's exercise of remedial power. *See Jenkins II*, 855 F.2d at 1299.

[315] *Jenkins II*, 855 F.2d at 1314.

possible without compromising its remedial goals.[316] Nonetheless, greater school district participation in the tax levying process realized as a result of this ruling would hardly seem to ameliorate the district court's deeply intrusive tax order.[317]

The district court had purported to follow *Liddell VII*'s no other alternative test[318] before resorting to tax levy orders, indicating that it "[had] explored all the alternatives set forth by the Eighth Circuit and [was] left with no choice but to exercise its broad equitable powers. . . ."[319] It found the test satisfied by the following events: the rejection by the voters of a 1987 bond issue and four tax levy increases between 1986 and 1987; the failure of the state legislature to enact legislation, supported by the court, to authorize more financing options to effectuate school desegregation; and the inability of the state and the KCMSD to agree on alternate funding methods for the KCMSD's share of the desegregation costs.[320] The Eighth Circuit agreed that *Liddell VII*'s no alternative test had been met and declared that the *Liddell VII* requirement of an evidentiary hearing was inapplicable because both the plaintiffs and the defendants consented to the entry of a judgment without an evidentiary hearing.[321] Chief Judge Lay, however, in his concurring and dissenting opinion, disagreed with respect to the availability of other measures to satisfy the no alternative test. He believed that other remedies were available. The court could order the state, as a joint tort-feasor, to fund the desegregation costs that existing state law restricted the school district from funding.[322]

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316 *See id.*

317 The district court ordered that the property tax increase to $4.00 per $100 of assessed valuation stay in effect through the 1991–92 fiscal year. *See* Jenkins v. Missouri, 672 F. Supp. 400, 413 (W.D. Mo. 1987); *see also* Missouri v. Jenkins, 495 U.S. 33, 63 (1990) (Kennedy, J., concurring) (discussing the district court's order).

318 *See* Liddell v. Missouri (Liddell VII), 731 F.2d 1294, 1323 (8th Cir. 1984) (articulating the no other alternative test).

319 *Jenkins*, 672 F. Supp. at 411.

320 *See id.* The court stated that no bond issues or tax levy increases had been approved by the voters since 1969. *See id.*

321 *See* Jenkins v. Missouri (Jenkins II), 855 F.2d 1295, 1310 (8th Cir. 1988).

322 *See id.* at 1318 (Lay, C.J., concurring in part and dissenting in part). Chief Judge Lay saw state funding as an alternative way to avoid the district court's order of a tax increase contrary to law. *See Jenkins*, 495 U.S. at 45.

On rehearing en banc, Circuit Judge Bowman, joined by Circuit Judge Wolman, dissented from the denial of the rehearing en banc and stated that in no other case in the country had the federal judiciary imposed a tax increase to fund a desegregation remedy. *See Jenkins II*, 855 F.2d at 1319. The dissenting opinion questioned the power of the court "to solve social problems that have their origins in other causes" and expressed the view that the federal judiciary had abrogated powers that were reserved to the states under the Tenth Amendment. *Id.*

b. Jenkins *in the Supreme Court of the United States in 1990*

The State of Missouri filed a petition for certiorari to the United States Supreme Court, arguing that the district court's remedies were excessive in scope and that the court-ordered property tax increase violated Article III, the Tenth Amendment, and principles of federal-state comity.[323] The Court granted the petition, but limited its review to the question of the property tax increase.[324] In Part III of Justice White's majority opinion, to which Justices Brennan, Marshall, Blackmun, and Stevens joined, the Court applied the no alternative test and held that the direct imposition of the tax increase by the district court violated comity principles because a less intrusive remedial action was available.[325]

The Court opined that the district court, for example, could have ordered the KCMSD to raise taxes in an amount sufficient to fund the desegregation orders, and it could have enjoined the state law limitations that curtailed the amount of tax revenue the KCMSD could raise.[326] The Court characterized the difference between a court's actual imposition of a tax and its direction to a governmental unit to levy a judicially authorized tax as "far more than a matter of form."[327] Because the district court alternatively could order the KCMSD to raise sufficient taxes to fund its remedial decrees, rather than order the taxes itself, another remedial alternative existed, leaving the no alternative test unsatisfied.

The Court dismissed the State's arguments that the Tenth Amendment and Article III barred the court-ordered taxation.[328] The exercise of judicial powers to enforce the Fourteenth Amendment could not be restricted by the Tenth Amendment because the Fourteenth Amendment was adopted specifically to "disestablish local government institutions that interfere with its commands."[329]

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[323] *See Jenkins*, 495 U.S. at 45.

[324] *See id.* The Court stated that it would not review whether the scope and cost of the funding orders violated principles of comity and equity because the Court's grant of certiorari was limited to the taxation issue. *See id.* at 53.

[325] *See id.* at 50–51. The Court held that the Eighth Circuit Court of Appeals should have invalidated the tax. *See id.* at 52. The Court declined to address the constitutional issues raised by Article III and the Tenth Amendment. *See id.* at 50. Later in the opinion, Justice White, writing for the majority, did address the issues raised by Article III and the Tenth Amendment. *See id.* at 55.

[326] *See id.* at 51.

[327] *Id.* The Court's distinction between a direct order of the district court to tax and a district court order directed at a local governmental entity to tax is meaningless. *See* La Pierre, *supra* note 1, at 342–43; Brocker, *supra* note 1, at 759.

[328] *See Jenkins*, 495 U.S. at 55. Earlier in the opinion, Justice White, writing for the majority, stated that the difficult constitutional issues posed by Article III and the Tenth Amendment were unnecessary to reach because the district court's direct imposition of the tax increase violated comity principles. *See id.* at 50.

[329] *Id.* at 55. The *Jenkins* Court cited to *New York City Board of Estimate v. Morris*, 489 U.S. 688 (1989), and *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). *See Jenkins*, 495 U.S. at 55. These decisions required that the one-person one-vote principle be followed in the establishment of districts from which state, *see Sims*, 377 U.S. at 566, and local governmental

When the Court next addressed the issue of whether a judicial order to increase taxes could be upheld under Article III's grant of judicial powers, it stated that "a court order directing a local governmental body to levy its own taxes is plainly a judicial act within the power of a federal court."[330] Relying upon the Supremacy Clause,[331] the Court concluded that once a district court finds that a particular remedy is required to fulfill a constitutional obligation, it may set aside state law limitations that prevent or obstruct the remedial process.[332]

The significance of *Jenkins* lies in its substantial expansion of the federal judiciary's equitable powers. The Court upheld judicially ordered property tax increases to raise the level of funding available for the implementation of court-ordered desegregation plans. It upheld the power of a district court to set aside state laws that limited the ability of a local school district to levy and collect taxes that the district court deemed necessary to meet its remedial objectives. By enjoining the operation of Missouri laws that authorized, as well as limited, the exercise of the KCMSD's taxation powers, the Court ordered school district taxation unauthorized by state law.[333] The Court thus expanded the KCMSD's power to levy taxes beyond that permitted by state law. The state laws set aside did not violate the Constitution and were not enacted to thwart a court-ordered

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officials, *see Morris*, 489 U.S. at 692, were selected. Enforcement of the one-person one-vote principle enhances representational democracy whereas the Court's displacement of tax and expenditure limitations limits representational democracy.

330 *Jenkins*, 495 U.S. at 55. The Court cited *Griffin v. County School Board*, 377 U.S. 218, 233 (1964), as precedent as well as cases in which the Supreme Court had ordered local governments to levy taxes to satisfy their contractual commitments. *See Jenkins*, 495 U.S. at 55–56. The Court failed to deal squarely with the State's argument that, unlike the cited cases, *Jenkins* was unique in requiring local authorities to raise taxes not authorized under state law. *See id.* at 56–57. The decision, *Von Hoffman v. City of Quincy*, cited by the Court, was not clearly applicable because the objectionable state law in *Von Hoffman* withdrew power from the city to raise taxes to fund payment of its indebtedness a number of years after the city had issued the outstanding bonds at issue pursuant to state authorization. *See* 71 U.S. (4 Wall.) 535, 554–55 (1866). Such action was found to impair a contract in violation of the Constitution. *See Jenkins*, 495 U.S. at 555.

331 The Supremacy Clause compels local and state governments to meet constitutional obligations. *See* U.S. CONST. art. VI, cl. 2. In *Alden v. Maine*, 119 S. Ct. 2240, 2255 (1999), Justice Kennedy, writing for the Court in a 5–4 majority opinion, stated that the states' obligation to abide by "the supreme Law of the Land" pursuant to the Supremacy Clause applied only to those federal acts in "accord with the constitutional design." Based on this statement, the Court appears receptive to the argument that the federal judiciary's institutional reform decrees likewise must conform to the Constitution's federal design in order to be obligatory upon the states.

332 *See Jenkins*, 495 U.S. at 57–58.

333 One commentator, finding the majority opinion's distinction between direct taxation and an order to tax as a "distinction without a difference," stated that *Jenkins* presents this issue: "judicial power to order local officials to levy and collect a tax in excess of their authority and contrary to state law limits." La Pierre, *supra* note 1, at 343.

remedial process. The Court, in effect, fashioned a federal common law rule that the federal judiciary may command and authorize taxation without the consent of the electorate to implement its remedial orders.[334]

Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia concurred in the Court's judgment that the district court's direct imposition of the tax at issue exceeded its judicial authority, but not in the view that a court may order a school district to levy taxes that exceed state law limits.[335] Justice Kennedy's concurring opinion rejected the majority's distinction between the direct imposition of a tax by the federal judiciary and a judicial order directing local entities to tax, characterizing the distinction as merely "convenient formalism."[336] Justice Kennedy pointed out that local governments must derive their powers from a state government.[337] Accordingly, a federal judicial order to impose a tax not authorized by state law could be made only by virtue of a federal decree, thereby raising the question of "whether a district court possesses a power to tax under federal law, either directly or through delegation to the KCMSD."[338] Justice Kennedy criticized the Court for failing to confront the issue of whether the district court possessed such power.[339]

The concurring justices argued that the district court's taxation order constituted an improper exercise of judicial power.[340] Judicially imposed taxation, in their view, lacked the adjudicative character needed for the exercise of judicial powers.[341] It denied due process to taxpayers, who were not parties to the litigation, because it gave them neither notice nor an opportunity to be heard through elected representatives.[342]

Justice Kennedy attacked the district court's judicially imposed taxation as an invasion of the province of the legislative branch, finding that district court orders intruded into a sphere protected by *Milliken I*'s admonition that district courts'

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334 *See id.* at 401.

335 *See Jenkins*, 495 U.S. at 58–59 (Kennedy, J., concurring). The concurring opinion referred to *National City Bank v. Battisti*, 581 F.2d 565 (6th Cir. 1977), and *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969), as pertinent examples of federal court decisions in which remedial decrees dictating school financing methods had been found to be beyond federal judicial authority. *See Jenkins*, 495 U.S. at 61 (Kennedy, J., concurring).

336 *See Jenkins*, 495 U.S. at 63–64 (Kennedy, J., concurring).

337 *See id.* at 64.

338 *Id.* at 65.

339 *See id.*

340 *Id.* at 66. The concurring opinion stated that a federal court lacks the remedial power to directly impose a state tax and cited *The Federalist No. 78* as "[reflecting] the Framers' understanding that taxation was not a proper area for judicial involvement." *Jenkins*, 495 U.S. at 65.

341 *See Jenkins*, 495 U.S. at 66 (Kennedy, J., concurring).

342 *See id.*

remedial powers do not extend to the restructuring of local government entities or their financial systems.[343] His concurring opinion also raised the following policy concerns: the lack of judicial accountability to the voters,[344] voter frustration stemming from a lack of representation, the difficulty of administering a system of taxation without input from the electorate, and the need to get community support for taxation.[345]

Justice Kennedy next rejected the majority's view that the failure to uphold the district court's tax order would leave the federal judiciary powerless to redress constitutional violations.[346] Further, the concurring in part opinion denied the necessity of judicial taxation in *Jenkins* because interdistrict comparability, the district court's goal, lacked constitutional command.[347] The Court had ruled earlier, in a 1973 decision, that unequal school district expenditures did not violate the Equal Protection Clause.[348] Justice Kennedy's opinion gave credence to the State's charge that the KCMSD used the litigation as a tool to obtain expanded funding that otherwise would be unavailable to it.[349]

Justice Kennedy contended that a demonstrated need for the judicial taxation was missing because the district court did not try less costly remedies, obtainable within the existing tax structure. He argued that a taxation order should not be entertained until the district court made a specific finding that the constitutional

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[343] *See id.* at 68.

[344] *See id.* at 71 ("A legislative vote taken under judicial compulsion blurs lines of accountability by making it appear that a decision was reached by elected representatives when the reality is otherwise.").

[345] *See id.* at 69–70.

[346] *See id.* at 75. Justice Kennedy's concurring opinion stated that both the scope of the remedies and the taxation approved by the Eighth Circuit were "without parallel." *See id.* at 61.

[347] *See id.* at 76. Justice Kennedy argued that the judiciary risks a loss of legitimacy when it fails to exercise restraint and oversteps its authority by entering into the "volatile field of taxation." *Id.* at 75. The opinion cautioned that a remedial plan centered upon upgrading the KCMSD schools to a quality that would attract white suburban students placed the district court in a policy area best left to the local community. *See id.* at 76. The concurring opinion stated:

> A remedy that uses quality of education as a lure to attract non-minority students will place the District Court at the center of controversies over educational philosophy that by tradition are left to this Nation's communities. Such a plan as a practical matter raises many of the concerns involved in interdistrict desegregation remedies.

Id. (citation omitted).

[348] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973). The concurring opinion in *Jenkins* referred to the *Rodriguez* case. *See Jenkins*, 495 U.S. at 76 (Kennedy, J., concurring).

[349] *See Jenkins*, 495 U.S. at 76 (Kennedy, J., concurring). The concurring opinion stated that the initial finding of discrimination could not become the rallying ground for the provision of quality education that enmeshed the court in a debate over spending priorities. *See id.* at 77.

violation would remain unremedied without judicially mandated tax increases.[350] He viewed specific components of the educational program approved by the district court as well beyond the norm of expected educational expenditures and criticized the district court for failing to consider the availability of other remedies without causing a revenue shortfall.[351] The concurring justices' viewpoints are well reflected in the following closing remarks: "[R]ules of taxation that override state political structures not themselves subject to any constitutional infirmity raise serious questions of federal authority, questions compounded by the odd posture of a case in which the Court assumes the validity of a novel conception of desegregation remedies we never before have approved."[352]

C. *Court-Ordered Taxation in Bond Cases Distinguished from Taxation Ordered in* Jenkins

The Supreme Court's majority opinion in *Jenkins* relied heavily upon the nineteenth century bond cases and *Griffin v. County School Board* as precedent for upholding the district court's judicial taxation.[353] These precedents, easily distinguishable from *Jenkins*, do not provide the support necessary for *Jenkins*'s deep intrusion upon state and local taxing discretion. The bond cases may be distinguished in several respects.

1. *Violation of Express Text in the Bond Cases*

First, the nature of the constitutional violation in the bond cases differs from that in *Jenkins*. In the former, the local governments violated the express text of the Constitution, Article I, Section 10, Clause 1, known as the Contract Clause, which prohibits the states from impairing contractual obligations.[354] In each bond case cited by the Court in *Jenkins*, the local government had obligated itself by contract to levy taxes to retire indebtedness evidenced by outstanding bonds. In some instances, the state passed subsequent legislation that prevented the local government from levying taxes in the amount originally committed at the time of

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[350] *See id.* at 79 ("[A]s a prerequisite to considering a taxation order, I would require a finding that that [sic] any remedy less costly than the one at issue would so plainly leave the violation unremedied that its implementation would itself be an abuse of discretion.").

[351] *See id.* at 77–79.

[352] *Id.* at 80.

[353] *See id.* at 55–58.

[354] Originally, the Contract Clause was viewed as prohibiting the states only from interfering with private contracts; its applicability to contracts made by state and local governments was first made by the Marshall Court in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810). *See* Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277, 288–89 (1990).

the issuance of the bonds.[355] The Court found that the local government impaired its obligation of contract with bondholders when it failed to levy taxes, whether attributable to deliberate neglect or the removal of taxation power after the issuance of the bonds. In those instances, the local governments' clear violation of the Constitution was indisputable.

The Court's interpretation of the Fourteenth Amendment, beginning in *Brown I*, makes racially segregated public education unconstitutional. Unlike the express constitutional language governing the bond cases, no specific constitutional text mandates that a school district carry out certain remedial measures to further integrated school education, nor is it textually clear, as to the necessary parameters of the remedial process to arrive at a unitary system of education. In fact, district courts approve a variety of educational plans and administrative structures designed to reach unitary status.[356]

2. *Removal of the Constitutional Violation in the Bond Cases*

The effectiveness of a taxation remedial order is demonstrated easily in the bond cases. In those cases, the Court's order to levy taxes clearly eliminated the Contract Clause violation by providing the governmental funding necessary to

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[355] *See, e.g.*, Louisiana *ex rel.* Hubert v. Mayor of New Orleans, 215 U.S. 170, 180–81 (1909); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 548, 554 (1866).

[356] In *Coalition to Save Our Children v. State Board of Education of Delaware*, 757 F. Supp. 328, 359–64 (D. Del. 1991), for example, the district court ordered a desegregation plan that included magnet school programs, student assignments, written curriculum guides, community outreach, reporting to the state's board of education, and the creation of a parent information center. In *United States v. Yonkers Board of Education*, 635 F. Supp. 1577, 1577–79 (S.D.N.Y. 1986), the district court judge ordered the city to implement a fair housing program to assist in school desegregation. The plan included the development of public housing in predominantly white areas of the city. *See id.* at 1582; *see also* Stell v. Board of Educ., 724 F. Supp. 1384, 1386–87, 1399–1400 (S.D. Ga. 1988) (approving a magnet school program and majority to minority transfers when court-directed 1971 plan providing for pairing and clustering of all-black and all-white schools, mandatory student assignments, and extensive busing failed to achieve unitary status due to white flight); Arthur v. Nyquist, 473 F. Supp. 830, 838–39 (W.D.N.Y. 1979) (describing a voluntary desegregation program in Buffalo, New York that provided elementary education for minority inner-city students by transporting them to a predominantly majority receiving school located on the periphery of the city); Reed v. Rhodes, 455 F. Supp. 569, 610–12 (N.D. Ohio 1978) (ordering the imposition of minority to nonminority ratios for instructional and administrative staffs); Tasby v. Estes, 412 F. Supp. 1192, 1212–21 (N.D. Tex. 1975) (ordering a desegregation plan that included the creation of sub-districts to foster a sense of community and the utilization of student assignment criteria, K–3 early childhood education centers, intermediate school centers, magnet high schools, career education, bilingual education, special education to address handicapping conditions, majority to minority transfer programs, minority to majority transfers, curriculum transfers, transportation, adjustments to attendance zones, student discipline policies, improved school facilities, improved recruitment and employment policies, personnel competence assessment, teacher and principal assignments, training, and an accountability system).

carry out the terms of the contract with the bondholders. In some of the bond cases, the remedy consisted of simply striking down a statute that prevented the municipality from raising the taxes it had originally pledged to retire the bonds.[357] Thus, the Court order put the local government back in the same position it occupied at the time of the issuance of the bonds. The efficacy of district court decrees to spend unprecedented amounts of money to improve the quality of education in school districts subject to desegregation orders cannot be shown as readily. For example, the expenditure of $1.3 billion over nine years[358] by the KCMSD failed to improve test scores appreciably over those in other urban areas not subject to court-ordered taxation.[359]

3. *State Law Limitations Set Aside in the Bond Cases Evaded the Constitution*

The nature of the state law limitations also differs in the bond cases from the taxation and expenditure limitations posed in cases such as *Jenkins*. In the bond cases, the state law limitations that prevented compliance with the Constitution were deliberately enacted to evade the constitutional prohibition against the impairment of state or local contracts.[360] In *Jenkins*, the state law limitations at issue that precluded the school district from raising taxes in an amount sufficient to carry out the district court's remedial decrees stemmed from the Missouri taxpayers' revolt against higher taxes in general. These tax limits could not be tied to a specific desire upon the part of the taxpayers to prevent school desegregation. The Missouri laws at issue contained no unconstitutional provisions.

4. *Local Authorization Existed for the Taxation Ordered in the Bond Cases*

In *Jenkins*, the district court's order to increase the levy of school district

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[357] *See infra* note 360.

[358] According to the State of Missouri, the state reported a cost of $1.3 billion with the state's share of the cost totaling $838 million. *See* Linda Greenhouse, *High Court to Review Kansas City School Desegregation Case*, N.Y. TIMES, Sept. 27, 1994, at A23. On June 14, 1985, the district court issued its original remedial order. *See* Jenkins v. Missouri, 672 F. Supp. 400, 402 (W.D. Mo. 1987); Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985).

[359] *See* Greenhouse, *supra* note 358, at A23. Student achievement in the school district had not reached "national norms as measured by standardized test scores." *Id.*; *see also supra* notes 201–04 and accompanying text.

[360] *See* Missouri v. Jenkins, 495 U.S. 33, 72 (1990) (Kennedy, J., concurring). In *Von Hoffman*, as Justice Kennedy pointed out, the Court had invalidated a law that prevented the state from fulfilling its constitutional obligation under the Contract Clause; once the Court annulled the law, the state had the authority to impose the tax. *See id.* at 72. In contrast to the law invalidated in *Von Hoffman*, the neutrally imposed tax limit in *Jenkins* violated no specific constitutional provision. *See id.*

taxes above that authorized under state law amounted to the enactment of federal law imposed upon the state's residents. The Court in effect created new legislation that changed the formula for the amount of taxes that could be raised. By contrast, all taxation orders in the bond cases could be effectuated under existing state legislation enacted by the voters' representatives. Minimal comity concerns arose because all taxation was accomplished pursuant to a local or state statute.

In one bond case, *City of Galena v. Amy*,[361] the Court upheld the lower court's peremptory writ to compel taxation, albeit in an amount insufficient to cover the payment of the principal of and interest on the bonds. The lower court decreed a one percent tax on one dollar of assessed valuation because the municipality originally committed that amount of taxation to retire the bonds. Counsel did not even argue that a higher amount should be levied. These bond cases express the clear understanding that all taxes ordered must be authorized under some existing state law. The Court affirmed the imposition of taxation as originally pledged under laws then in effect to secure payment of the bonds. At most the Court sanctioned judicial abrogation of a statute that subsequently limited the ability of the municipality to retire the bonds after they were issued. Because such statutes impaired the locality's obligation of contract, they constituted unconstitutional voter expressions.[362]

D. *Court-Ordered Taxation in* Griffin *Distinguished from Taxation Ordered in* Jenkins

Griffin v. County School Board differs from *Jenkins* in a number of respects. *Griffin*, like the nineteenth century bond cases cited in *Jenkins*, endorsed the power of the federal judiciary to order taxation to make possible the fulfillment of a concrete constitutional obligation. Until the county supervisors reopened Prince Edward County's schools, its school children received unjustified, different treatment than the school children in other Virginia counties—conduct that violated the Fourteenth Amendment. Like the local entities in the bond cases, the county engaged in a course of conduct that flagrantly violated the Constitution: it refused to integrate its school system.

The constitutional violation in *Griffin* could not be removed without the taxation ordered because the county's schools needed revenues to reopen. In later

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[361] 72 U.S. (5 Wall.) 705 (1866).

[362] *See, e.g.*, Louisiana *ex rel.* Hubert v. Mayor of New Orleans, 215 U.S. 170, 178 (1909) (finding that subsequently enacted legislation that withdraws or lessens the power of taxation properly relied upon as securing payment of bonded indebtedness at the time of issuance impaired the obligation of bondholders' contracts); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 554–55 (1866) (stating that where a state authorizes local taxation powers to meet contractual obligations, withdrawal of such powers before the contract is satisfied impairs the obligation of contract).

cases involving tax orders to fund desegregated education, the degree of taxation needed to finance the school desegregation plan, not a total lack of funding, constituted the pivotal issue. Unlike the county supervisors in *Griffin*, local officials in these cases did not refuse to tax; rather, they levied taxes in amounts the plaintiffs deemed insufficient to achieve a unitary school system. As in *Jenkins*, the district court's taxation orders provoked controversy because sharp disagreement existed as to the amount of funding needed to achieve this status. This situation sets in motion a far more complex pattern of conflicting values and issues than the *Griffin* facts, which involved not only deliberate actions to thwart court-ordered desegregation but also an obvious need for taxation to remedy the constitutional violation.

Unlike the local authorities in *Jenkins*, the county supervisors in *Griffin* possessed the power to levy the taxes ordered by the federal district court. In both the bond cases and in *Griffin*, the judicially mandated order to tax did not involve any recasting of existing state taxation laws.[363] In *Jenkins*, the court's ordered taxation constituted a legislative act because the KCMSD lacked authority under the state's laws to tax at the level ordered by the court for the purpose of implementing a school desegregation plan. In the absence of underlying state authority for the imposition of the remedial funding tax, the federal decree rewrites the state's tax laws, intruding deeply upon local and state governmental operations.

III. THE FEDERAL JUDICIARY'S FISCAL REMEDIAL APPROACHES TO CORRECT CONSTITUTIONAL VIOLATIONS

Parts I and II provided historical background for the Supreme Court's expansive use of equitable powers to fund the implementation of school desegregation plans. The Court's use of remedial funding and taxation powers occurs in other areas of institutional reform litigation as well. This Part describes and analyzes the principles declared by the Court to guide the exercise of its remedial powers when the Court deems state and local funding necessary to correct constitutional violations.[364] When a court-ordered remedial process either explicitly or implicitly calls for local or state governmental funding, courts

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[363] *See Jenkins*, 495 U.S. at 71 (Kennedy, J., concurring) ("*Griffin* endorsed the power of a federal court to order the local authority to exercise *existing* authority to tax.") (emphasis in the original).

[364] *See* ELY, *supra* note 14, at 86 (upholding judicial intervention when representative processes fail to represent minority interests); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 715–32 (1978) (describing lower federal court decisions that have mandated state expenditures, especially in the areas of corrections and the care of the mentally ill and the mentally retarded); Yoo, *supra* note 4, at 1122 (pointing out that the federal courts have imposed broad structural remedies upon state institutions without proper regard for inherent limitations upon their powers).

frequently refer to one or all of the following guiding principles:

(1) The cost of a remedy should not impede its use;[365]
(2) State law limitations upon spending do not preclude federal court-ordered fiscal remedies;[366] and
(3) Remedies should not be crafted that overly intrude into local government affairs or otherwise violate the principles of comity and federalism.[367]

The Court applies principles one and two as categorical rules and disregards any state and local interests that impede the federal remedial process. These principles override state and local autonomy in resource allocation and law making. Principle three, on the other hand, balances the values of federalism against the need for remedial measures to correct state and local constitutional violations. It calls for limitations upon the judiciary's federal remedial powers in keeping with the balance of federal and state power envisioned by the Framers in the constitutional framework.[368]

Neither the policy of strict remedial accountability irrespective of available fiscal resources nor the policy of fashioning a remedy that sensitively takes local needs and resources into account have reached a stage of development where systematic application occurs. When addressing resource allocation issues created by funding orders, the court usually will state tersely that the lack of funds does not excuse a failure to remedy constitutional violations. A court that devises a remedy that cuts a smaller slice of the tax dollar than advocated by the plaintiffs may talk about the court's duty to consider the cost and effect of the proposed remedies, which should not be more extensive than necessary to correct the constitutional violation.[369] The circumstances under which either policy can be invoked remain vague, and courts might refer to the two policies interchangeably

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365 *See infra* notes 371–80 and accompanying text; *see also* Frug, *supra* note 364, at 725, 725 n.71.

366 *See infra* notes 381–418 and accompanying text.

367 *See infra* notes 435–65 and accompanying text.

368 *See* Epstein, *supra* note 87, at 1102 (pointing out that "sometimes proposed remedies are so excessive they cannot be justified as rectification of past wrongs"); Friedman, *supra* note 1, at 753–56, 768 (pointing out that courts take cognizance of the political environment when they devise remedies); Lawrence Lessig, *Translating Federalism*: United States v. Lopez, 1995 SUP. CT. REV. 125, 128 (pointing out that the Court has oscillated between allowing the exercise of a full range of textual federal powers and limiting power, even if textually permitted, to preserve the constitutional framework's balance between federal and state authority).

369 *See* Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982) (opining that courts, in ordering a remedy to correct Eighth Amendment violations, must consider the cost of compliance and the effect of the remedy on the legitimate security needs of prisons); LeMaire v. Maass, 745 F. Supp. 623, 629 (D. Or. 1990) (stating that a court must consider the cost and effect on prison security needs when fashioning a remedy to correct unconstitutional prison conditions).

in the course of an opinion.[370]

A. *The Cost of a Remedy Should Not Impede Its Use*

The federal judiciary does not hesitate to order state and local governments to undertake costly remedies once it finds a constitutional violation.[371] The Court has opined that neither the political question doctrine nor the separation of powers doctrine applies to the federal judiciary's relationship to the states.[372] Federal courts refer to the Supremacy Clause as support for court-ordered funding that contravenes a state's laws and a state's constitution.[373] Typically, the federal

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[370] In *Jenkins v. Missouri* (*Jenkins II*), the Eighth Circuit Court of Appeals referred to the choice of remedies to redress racial discrimination as a balancing process within appropriate limits. *See* 855 F.2d 1295, 1299 (1988). Later in the *Jenkins II* opinion, the court took a rights maximizing point of view and stated that the rights to a public education free of racial discrimination could not be thwarted by rights granted by the state to its citizenry to limit taxation by popular vote. *See id.* at 1313–14. The court next discussed the need to use minimally obtrusive methods to correct constitutional deficiencies. *See id.* at 1314.

In *LeMaire*, the district court, in continuous paragraphs, referred to the necessity to consider the cost of prison security needs in fashioning a remedy, the need to avoid undue judicial interference, and the court's duty to correct unconstitutional prison conditions each as applicable legal standards. *See LeMaire*, 745 F. Supp. at 629. In *Knop v. Johnson*, 685 F. Supp. 636, 638 (W.D. Mich. 1988), the district court referred to both the policy of strict accountability and federalism concerns in stating that "[c]omity, federalism and appropriate deference to prison administrators notwithstanding, it remains this Court's duty to devise an order which will promptly and effectively remedy the constitutional inadequacies noted in my opinion of August 10, 1987."

[371] In both Eighth Amendment and Fourteenth Amendment school desegregation cases, federal courts have repeatedly ruled that the cost of a remedy should not impede its use to remedy constitutional violations. *See, e.g.*, Toussaint v. McCarthy, 801 F.2d 1080, 1110 (9th Cir. 1986) (upholding district court order to install sound-absorbing wall coverings in prison's five-tier units as a proper exercise of district court discretion because the fact that a remedy is costly does not preclude its use); Stell v. Board of Educ., 724 F. Supp. 1384, 1405 (S.D. Ga. 1988) (refusing to accept any financial excuses for the implementation of a desegregation plan involving educational enhancements that were "ambitious and expensive"); Evans v. Buchanan, 455 F. Supp. 692, 698 (D. Del. 1978) (opining that after *North Carolina State Board of Education v. Swann*, the court's inherent power to fashion effective desegregation orders that encompass adequate funding cannot be disputed and stating that such inherent power precludes the judiciary's usual deference to a legislature in matters of taxation). *But see* Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 597 F. Supp. 1220, 1224 (E.D. Ark. 1984), *remanded* 778 F.2d 404, 408, 433–34 (8th Cir. 1985), in which an interdistrict magnet remedy was rejected in favor of less intrusive measures.

[372] *See* Elrod v. Burns, 427 U.S. 347, 352 (1976) (plurality opinion).

[373] *See* Missouri v. Jenkins, 495 U.S. 33, 57 (1990) (upholding district court power to order school districts to levy taxes to implement school desegregation remedies, irrespective of state law limitations that bar such taxation, because "[t]o hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them"); *see also* Spain v. Mountanos, 690 F.2d

judiciary will declare that the fiscal consequences of such orders do not excuse the constitutional violation and should be ignored, even when strained fiscal resources make the remedy difficult to provide.[374] When litigants enter into consent decrees to correct constitutional violations, the federal courts show reluctance to impose affirmative funding obligations, however, unless the parties have expressly agreed to them.[375]

742, 746 (9th Cir. 1982) (affirming district court's order to the state to pay attorney's fees owed in 42 U.S.C. § 1983 litigation because under the Supremacy Clause, federal law may be enforced even though the order contravenes the state's laws and constitution); *Evans*, 468 F. Supp. at 949 (finding that school districts and private parties may turn to specific orders of the district court to carry out duties and rights created by the Supremacy Clause); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 358 (1992) (presenting Alexander Hamilton's view that the Supremacy Clause avoids federal and state authority conflict by binding both state and federal judicial officers to enforce federal law); MCGOWAN, *supra* note 85, at 38–39 (arguing that inclusion of the Supremacy Clause in the Constitution makes conflict between state and federal courts inescapable); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1458 (1987) (discussing the introduction of the Supremacy Clause at the Constitutional Convention of 1787).

[374] *See* Gates v. Collier, 501 F.2d 1291, 1319–20 (5th Cir. 1974) (finding that a shortage of state funds did not excuse the enforcement of a district court order calling for hiring new employees and improving physical facilities to remove constitutional violations occurring in the operation of the Mississippi State Penitentiary). In *Gates*, the Fifth Circuit utilized a rights maximizing approach and opined that a "[s]hortage of funds is not a justification for continuing to deny citizens their constitutional rights." *Id.* at 1320. To support its conclusion, the *Gates* court quoted from *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971), stating that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Gates*, 501 F.2d at 1320.

In *San Francisco NAACP v. San Francisco Unified School District*, 695 F. Supp. 1033, 1041 (N.D. Cal. 1988), *rev'd*, 896 F.2d 412 (9th Cir. 1990), the court enforced a school desegregation consent decree that imposed financial obligations upon the state. Finding that such obligations cannot be excused on the basis of financial inability, the court held that agreed upon state financial commitments in the decree could be enforced irrespective of subsequent state legislation limiting the extent of state financing available for school desegregation remedies. *See id.* On appeal, the Ninth Circuit Court of Appeals reversed, finding that the language of the consent decree did not provide an unqualified guarantee of state funding. *See San Francisco NAACP*, 896 F.2d at 414.

[375] *See San Francisco NAACP*, 896 F.2d at 414 (finding that state's commitment to reimburse desegregation costs pursuant to a consent decree could be reduced by subsequently enacted state law limitations when parties failed to stipulate for an unqualified guarantee of state funding); New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162, 163, 168 (2d Cir. 1980) (refusing to hold the state governor in contempt if funding failed to be provided to improve conditions for mentally retarded residents pursuant to a consent decree because the governor took all actions within his lawful authority, and the consent decree did not contemplate the payment of unappropriated funds from the public treasury); *cf.* United States v. Board of Educ., 717 F.2d 378, 380, 383 (7th Cir. 1983) (upholding the district court's determination that the United States' obligation under a consent decree extended beyond assistance to the school board in locating and applying for federal funds when the consent

Inmates of Allegheny County Jail v. Wecht[376] and *Tasby v. Edwards*[377] illustrate the federal judiciary's inclination to disregard the financial impact of its remedial plans. In *Inmates of Allegheny County Jail*, the district court, after stating that the cost of a remedy does not preclude its use, ordered the county to submit plans for the construction of a new jail facility.[378] In *Tasby*, the court referred to *Jenkins* as support for the proposition that a school district subject to a desegregation court decree could not treat cost as a determinative factor, although it acknowledged that cost constituted one factor to be considered.[379] The *Tasby* court rejected a school district's request to lessen overcrowding at three elementary schools by converting the existing facilities of a magnet montessori school into an elementary school and relocating the montessori school's operations to another site. The court stated that the montessori school's population at the proposed new location would become predominantly minority and that other solutions to overcrowding should be explored.[380]

B. *State Law Limitations Do Not Preclude Federal Court-Ordered Fiscal Remedies*

1. *Emergence of the Principle That State Law Limitations Do Not Preclude the Imposition of Federal Court-Ordered Remedies*

Traditionally, federal courts have been loath to set aside neutrally enacted state laws that impede or prohibit the implementation of remedies that federal courts might otherwise order.[381] In 1971, in *North Carolina State Board of*

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decree required the federal government "to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan").

376 699 F. Supp. 1137 (W.D. Pa. 1988); *see also Toussaint*, 801 F.2d at 1110 (upholding the power of a district court to order the installation of costly sound-absorbing wall coverings in California prisons).

377 799 F. Supp. 652 (N.D. Tex. 1992).

378 *See Inmates of Allegheny County Jail v. Wecht*, 699 F. Supp. at 1147–48.

379 *See Tasby*, 799 F. Supp. at 659.

380 *See id.* at 658.

381 In *Milliken v. Bradley* (*Milliken* I), for example, the Court invalidated a district court's remedial plan to decrease racial imbalances in the Detroit public school system by consolidating numerous independent school districts. *See* 418 U.S. 717, 752–53 (1974). The Court found that the proposed remedy would alter the structure of public education in Michigan and would result in the restructuring of Michigan laws related to school districts, a remedial measure that the court rejected. *See id.* at 742–44. Likewise, in *Spencer v. Kugler*, 326 F. Supp. 1235, 1240–43 (D. N.J. 1971), *aff'd*, 404 U.S. 1027 (1972), the district court dismissed a complaint that sought to correct racial imbalances in New Jersey schools by invalidating state statutes that made school district boundaries coterminous with municipal boundaries. The court acknowledged that racial imbalances in some New Jersey municipalities resulted in racial imbalances in the

Education v. Swann,[382] the Supreme Court ruled, however, that state laws can be set aside should they hinder the effectuation of court-ordered school desegregation remedies.[383] Federal courts subsequently ruled, in school desegregation decisions, and in other contexts as well, that state law limitations cannot impede remedial processes instituted by the federal judiciary.[384] Federal courts have further opined that the federal judiciary possesses the power to enjoin the operation of state laws that limit revenue sources deemed necessary to remove the constitutional violation.[385] Federal courts again cite the Supremacy Clause as justification for such orders.[386]

After *Swann*, the Supreme Court, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*,[387] ruled that state agencies could be ordered, as lawsuit parties, to promulgate regulations to carry out the Court's decree even if they lacked rule making power under state law.[388] The

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municipalities' schools. *See id.* at 1240, 1242–43.

[382] 402 U.S. 43 (1971).

[383] *See id.* at 45.

[384] *See, e.g.*, Arthur v. Nyquist, 712 F.2d 816, 821 (2d Cir. 1983) (rejecting the argument that the district court's remedial plan as to the hiring of minority teachers was "invalid simply because it infringe[d] upon statutory and contractual rights (collective bargaining agreements) of majority teachers who [had] played no role" in the school board's past segregative practices); Gates v. Collier, 501 F.2d 1291, 1319–20 (5th Cir. 1974) (upholding implementation of the district court's remedial plan to improve a state's prison staff and facilities even in the absence of the state law requirement of a legislative appropriation).

[385] *See* Jenkins v. Missouri, 122 F.3d 588, 603 (8th Cir. 1997) (upholding district court's power to continue enjoining the enforcement of state laws that impede the KCMSD's ability to tax at the level deemed necessary to ensure the success of its programs).

Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980), illustrates the federal judiciary's propensity to override state laws that prevent the effectuation of a court-ordered funding remedy irrespective of the fiscal protective function served by such laws at the local level. When the defendants raised the issue of compliance with state-law imposed spending limits, the court said: "[I]t is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." *Id.* at 1043–44 (citations omitted).

[386] *See* Spain v. Mountanos, 690 F.2d 742, 744, 746 (9th Cir. 1982) (affirming a district court order directing the State Controller to issue a warrant on the State Treasurer for attorneys' fees owed in 42 U.S.C. § 1983 litigation even though the lack of an appropriation for such purpose violated the California Constitution). The *Spain* court stated that "[u]nder the Supremacy Clause of the United States Constitution, a court, in enforcing federal law, may order state officials to take actions despite contravening state laws." *Id.* at 746; *see also* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979) (finding that the Supremacy Clause commands compliance with a federal court order that overturns state law).

[387] 443 U.S. 658 (1979), *modified sub nom.* Washington v. United States, 444 U.S. 816 (1979).

[388] *See Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 695. The case involved litigation in which the Washington Supreme Court had ruled that the State Fisheries Department could not comply with a district court injunction that required the

Court doubted, however, that the resulting regulations would have effect as state law.[389] Nonetheless, the Court stated that if Washington's Game and Fisheries Departments could not be ordered to promulgate regulations enforceable as a matter of state law, the district court could "prescind that problem by assuming direct supervision of the fisheries."[390]

Federal courts frequently cite *Swann* and *Washington* when they uphold district court remedial orders that set aside state laws found to interfere with the remedial correction of constitutional violations.[391] Unlike the mandate in *Washington*, in which the Court ordered Washington state departments to adopt regulations to implement the Court's interpretation of Indian treaty rights, the state laws curtailing taxation in *Jenkins* did not conflict with the exercise of federal power pursuant to a federal statute that preempted state law. *Jenkins* is distinguishable also from *Swann*. The Court's override of state law in *Jenkins* made a quantum leap from *Swann* because the state law limitations set aside in

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Department to adopt regulations protecting certain Indian treaty rights. The injunction granted Indians rights to a 45–50% share of the harvestable fish passing through their recognized tribal fishing grounds. The state court was of the opinion that, as a matter of federal law, the treaties did not give Indians a right to a share of the fish runs. The district court then issued orders to enable it, with the aid of the U.S. Attorney for the Western District of Washington and various federal law enforcement agencies, to directly supervise those aspects of the state's fisheries necessary to preserve the treaty fishing rights. *See id.* at 673. The State and the commercial fishing associations challenged the legality of the district court's order to a state agency to take action without state law authorization and its authority to manage the state's fisheries after the state agencies refused to do so. *See id.* at 692–93. The Court responded by stating that any "[s]tate law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause. . . ." *Id.* at 695.

The Court cited *Swann*, *Griffin*, and *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), as support for its affirmance of the district court's power to order a Washington state department to prepare a set of rules to implement the Court's interpretation of Indian treaty rights. *See Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 695. In *City of Tacoma*, the Court held that state laws could not bar the city from acting under a federal license to build a dam on a navigable stream because federal law preempted state law. *See* 357 U.S. at 341. In the 1990s, the Court ruled that the Constitution's division of power between federal and state governments bars Congress from "commandeering" state governments to enact or enforce a federal regulatory program. *See* Printz v. United States, 521 U.S. 898, 909 (1992); New York v. United States, 505 U.S. 144, 175 (1992). Thus, the Court in *Washington* bestowed upon itself a power that it has forbidden Congress to exercise.

[389] *See Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 695.

[390] *Id.*

[391] *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33, 57 (1990); United States v. Yonkers Bd. of Educ., 902 F.2d 213, 219 (2d Cir. 1990); Jenkins v. Missouri (Jenkins II), 855 F.2d 1295, 1313 (8th Cir. 1988); Stout v. Jefferson County Bd. of Educ., 448 F.2d 403, 404 (5th Cir. 1971). Federal courts also refer to *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 744 (1974), as precedent supporting the rule that state laws cannot prevent the exercise of full remedied power to remedy constitutional violations. *See, e.g.*, Arthur v. Nyquist, 712 F.2d 816, 821 (2d Cir. 1983).

Jenkins,[392] unlike the Anti-Busing Law in *Swann*,[393] were not enacted to frustrate federal court remedial measures.[394] In *Jenkins*, the Missouri tax limitations reflected voter sentiment concerning state and local taxation policies, raising issues recognized by the Supreme Court as subject to comity principles.[395]

Courts should be cognizant that state law limitations arise in a number of contexts. Often the nexus between the state law limitation and its ability to severely thwart the desired federal remedy are far more attenuated than was the case in *Swann* and *Washington*. Unfortunately, *Swann*'s broad rhetoric that state law limitations "must give way when [they] hinder vindication of federal constitutional guarantees"[396] may lead courts to overlook both the important policy considerations underlying state law limitations and the deference those limitations receive on the basis of comity and federalism concerns. State tax and expenditure limitations should also be distinguished from other types of state law limitations because they involve state revenue and fiscal policy, a sensitive area in which the Court has shown little inclination to intrude.[397]

2. *Categorization of State Law Limits*

The federal judiciary most frequently abrogates state law limitations that are viewed as impeding court-ordered remedies designed to desegregate public

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[392] The *Jenkins* Court referred to the following state law limitations:

(1) MO. CONST. art. X, § 11(b)–(c) (limiting "local property taxes to $1.25 per $100 of assessed valuation unless a majority of the voters in the district approve a higher levy, up to $3.25 per $100" and permitting a levy above $3.25 per $100 of assessed valuation if two-thirds of the voters agree). *See Jenkins*, 495 U.S. at 38.

(2) MO. CONST. art. X, § 22(a); MO. REV. STAT. § 137.073.2 (1986) (the Hancock Amendment) (requiring "property tax rates to be rolled back when property is assessed at a higher valuation to ensure that taxes will not be increased solely as a result of reassessments"). *See Jenkins*, 495 U.S. at 38–39.

(3) MO. REV. STAT. § 164.013.1 (Supp. 1988) (Proposition C) (allocating "one cent of every dollar raised by the state sales tax to a schools trust fund and requir[ing] school districts to reduce property taxes by an amount equal to 50% of the previous year's sales tax receipts in the district"). *See Jenkins*, 495 U.S. at 39.

[393] In *North Carolina State Board of Education v. Swann*, the Court affirmed a district court order enjoining the enforcement of a North Carolina statute, known as the Anti-Busing Law, that was enacted to thwart school desegregation remedies ordered by the judiciary. *See* 402 U.S. 43, 44 n.2 (1979). Furthermore, the Court found that the activity prohibited by the North Carolina law was the "one tool absolutely essential to fulfillment of [a] constitutional obligation to eliminate existing dual school systems." *Id.* at 46.

[394] *See* La Pierre, *supra* note 1, at 344 (stating that unlike the statute at issue in *Swann*, the Missouri statutes and constitutional provisions restricting the KCMSD's taxation powers were not enacted to impede the implementation of a school desegregation plan).

[395] *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 109–16 (1981).

[396] *Swann*, 402 U.S. at 45.

[397] *See infra* notes 670–73, 762–63 and accompanying text.

schools or correct Eighth Amendment[398] violations occurring in prisons. State law limitations that hamper court mandated reapportionment to cure Equal Protection Clause violations also have been struck down.[399] These state law limits take a variety of forms. In the school desegregation area, federal courts disregard state appropriation processes,[400] limitations on local taxing authority,[401] statutes that allocate the portion of school desegregation costs that the state should bear,[402] and statutes that support a seniority system in the retention of public school teachers.[403] State law fiscal restrictions include limitations upon property tax rates, property tax levies, revenue generation, expenditures, increases in property assessments, and the creation of debt.[404] In one instance a federal court

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398 U.S. CONST. amend. VIII.

399 *See* Board of Estimate of City of New York v. Morris, 489 U.S. 688, 690 (1989) (holding that membership apportionment of the New York City Board of Estimate violated the equal protection guarantee of one-person, one-vote).

400 *See, e.g.*, Arthur v. Nyquist, 712 F.2d 809, 814 (2d Cir. 1983) (upholding the power of the district court to order the expenditure of funds to implement desegregation remedies). *But see* State *ex rel.* Sikeston R-VI Sch. Dist. v. Ashcroft, 828 S.W.2d 372, 376–77 (Mo. 1992) (refusing to provide equitable relief that would set aside state constitutional appropriation requirements).

401 *See* Missouri v. Jenkins, 495 U.S. 33, 56–57 (1990) (holding that a local government may be ordered to levy taxes greater than the limit set by state statute when there is a constitutional reason).

402 *See* United States v. Board of Sch. Comm'rs, 677 F.2d 1185, 1187 (7th Cir. 1982) (requiring the state to pay the full cost of a metropolitan-wide desegregation remedial plan when a state statute required only state payment of one-half of the desegregation remedial costs).

403 In *Arthur v. Nyquist*, the Second Circuit Court of Appeals upheld a district court order mandating one-for-one hiring to reach a 21% minority target goal that violated the seniority system established by state law. The Second Circuit Court stated that the district court's remedial plan was not "invalid simply because it infringe[d] upon statutory and contractual rights (collective bargaining agreements) of majority teachers who played no role in the Board's past practices of segregation." 712 F.2d at 821.

The Seventh Circuit Court of Appeals took a different position in *People Who Care v. Rockford Board of Education School District No. 205*, 961 F.2d 1335 (7th Cir. 1992). The Seventh Circuit invalidated portions of a consent decree that altered seniority provisions incorporated in a collective bargaining agreement having the force of an entitlement under state law. *See id.* at 1339. The appellate court expressed the view that parties to a consent decree cannot agree to disregard valid state laws. *See id.* at 1337. It showed irritation at the Board of Education's agreement to eliminate the seniority provisions through the vehicle of the consent decree after it had found a buyout of such entitlements too expensive. *See id.* at 1338–39; *see also* Kasper v. Board of Election Comm'rs, 814 F.2d 332, 341–45 (7th Cir. 1987) (affirming a district court's refusal to approve a consent decree that would violate state law).

404 *See* STEVEN D. GOLD, NATIONAL CONFERENCE OF STATE LEGISLATURES FINANCE NO. 5, RESULTS OF LOCAL SPENDING AND REVENUE LIMITATIONS: A SURVEY 1–3 (1981) (on file with the Joyner Library, East Carolina University).

declined to ignore a state law calling for balanced budgets.[405]

In *Jenkins*, the Eighth Circuit Court of Appeals upheld the district court's set aside of state law constraints upon the KCMSD's taxation powers because it viewed these limits as placing too great a handicap upon the KCMSD's ability to remedy constitutional violations.[406] Although the adoption of state and local taxation, expenditure, and debt limitations has been widespread for decades, a wave of new limitations swept the country in the 1970s and 1980s that limited the maximum revenue that a jurisdiction's property taxation could generate.[407] Prior to 1970, the majority of limitations restricted the rate of taxation, a restraint that does not limit revenues if assessments are rising.[408]

This latest tax revolt has been attributed to the public's demand for property tax relief, distrust of elected officials, dissatisfaction with government, and discontent with the public school system.[409] An argument can be made that these new tax limitations, such as Missouri's 1980 Hancock Amendment,[410] reflect voter reluctance to fund needed improvements for school children trapped in poor, segregated urban schools. Racist sentiments may accompany an unwillingness to finance these schools adequately, but it would be difficult to prove that the voters' primary concerns were other than financial.[411] State

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405 *See* United States v. Board of Educ., 11 F.3d 668, 671–74 (7th Cir. 1993).

406 *See* Jenkins v. Missouri, 855 F.2d 1295, 1311–13 (8th Cir. 1988).

407 *See* DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM: CASES AND MATERIALS 413 (1996).

408 *See* GOLD, *supra* note 404, at 4. Further research is needed to quantify better the effect of state law limitations upon taxation and revenue generation. *See id.* at 48–54; *see also* Allan Odden, *Public School Finance: Fine-Tuning the System*, *in* CONFERENCE ON ALTERNATIVE STATE & LOCAL POLICIES, STATE & LOCAL TAX REVOLT: NEW DIRECTIONS FOR THE '80S, at 187 (Dean Tipps et al. eds., 1980). Sometimes the effect of the limitations is mitigated by increased aid or new taxes. *See* GOLD, *supra* note 404, at 49.

409 *See* MANDELKER ET AL., *supra* note 407, at 413; *see also* George G. Kaufman, *Inflation, Proposition 13 Fever, and Suggested Relief*, *in* THE PROPERTY TAX REVOLT: THE CASE OF PROPOSITION 13, at 215 (George G. Kaufman & Kenneth T. Rosen eds., 1981).

410 MO. CONST. art. X, §§ 16–24.

411 In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Court invalidated a Washington state initiative that terminated mandatory busing for the purpose of achieving greater integration in public schools. The Court found that the initiative was racially motivated and restructured the decision-making process to burden minorities. *See id.* at 470–71. It is more difficult to prove that the expenditure and taxation limitations adopted by many states in the 1970s and 1980s are racially motivated because generally they restrict funding at all levels of government and do not focus solely on education funding. *See, e.g.*, MO. CONST. art. X, §§ 16–24 (Hancock Amendment). The United States Supreme Court has upheld voter adopted measures that affect the ability of local governments to generate tax revenues. In *Nordlinger v. Hahn*, 505 U.S. 1, 18 (1992), the Court found that California's Proposition 13 (restricting property tax rates to 1% of market value, rolling back assessed values to 1975–76 levels, placing a 2% cap on annual increases in property assessments, prohibiting the imposition

financial restraints existed in the nineteenth century long before the federal courts were engaged in structural reform or school desegregation.[412]

Federal courts exhibit more reticence in overriding state law limitations in prison reform litigation than in school desegregation lawsuits. This result may stem from a greater willingness to disregard state law fiscal restraints than state laws regulating the management of prisons. Recent decisions emphasize that a neutral state law hindering a swift judicial remedy to correct Eighth Amendment violations can be set aside only when the district court makes findings that other remedial alternatives provide inadequate corrections and fashions a remedy that does not create too great an intrusion upon local and state functions.[413] Prison reform litigants frequently seek to establish a cap on the number of prisoners who may be housed in a particular facility for the purpose of alleviating overcrowding. In *Smith v. Sullivan*,[414] the district court imposed a five hundred inmate population cap for the El Paso county jail, overriding a state law that required county officials to accept all prisoners. The Fifth Circuit Court of Appeals found the order unwarranted in the absence of evidence showing the totality of circumstances required such remedial action.[415]

Federal courts have refused to enjoin state laws in other instances involving Eighth Amendment remedial measures. In *Stone v. City and County of San Francisco*,[416] decided after *Jenkins*, the Ninth Circuit Court of Appeals reviewed district court orders that reduced prison overcrowding by empowering a

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of new taxes on property, and requiring a 2/3 vote for other taxes) did not violate the Equal Protection Clause of the Fourteenth Amendment by the imposition of differential assessments and taxation on properties of comparable worth.

412 *See* Gelfand, *supra* note 292, at 546–55 (providing historical background on the origins and purposes served by debt ceilings, tax limitations, and expenditure limits).

413 *See, e.g.*, Stone v. City & County of San Francisco, 968 F.2d 850, 864 (9th Cir. 1992) (overturning a district court order permitting the sheriff to release prisoners in violation of state law because the district court did not make findings that other less intrusive alternatives were unavailable to reduce jail overcrowding); Woodson v. Sully, 801 F. Supp. 466, 470–71 (1992) (rejecting a proposed amended consent judgment that called for a Jail Control Authority and a Jail Administrator because the creation of these remedial measures was not authorized by state statutes and would be too intrusive upon the county government).

In *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986), a class action involving the conditions of confinement in segregated prison units, the Ninth Circuit Court of Appeals stated that the protection of inmates' constitutional rights does not vest the judiciary with the power to manage prisons. The Ninth Circuit admonished that federal courts must abide by a policy of minimum intrusion into state prison administration and "may not enjoin a state official to follow state law." *Id.* at 1087.

414 611 F.2d 1039 (5th Cir. 1980).

415 *See id.* at 1044–46 (invalidating a district court order imposing a 500 inmate limit on the jail population at the El Paso county jail in view of the fact that such an order could not be imposed until the court had conducted a hearing and evaluated evidence relating to the totality of conditions at the jail).

416 968 F.2d 850 (9th Cir. 1992).

California sheriff to release prisoners contrary to state law. The appellate court ruled that the district court's order violated federalism principles because the court reallocated power from the state legislative body to the executive branch and failed to ascertain the availability of alternative remedies before proceeding with its early release orders.[417] Federal courts also hesitate to impose remedial prison reform actions unauthorized by state law. In *Woodson v. Sully*, a federal district court rejected a proposal to transfer jail administration duties from the sheriff to a proposed public authority in the absence of state law authorization.[418]

3. *Reluctance to Modify Consent Decrees to Override State Law Limitations*

Federal courts generally decline to adopt proposed consent decree modifications that override state law because parties should not be empowered to agree contractually to disregard valid state laws.[419] In *People Who Care v. Rockford Board of Education School District No. 205*,[420] the Seventh Circuit Court of Appeals invalidated portions of a consent decree that altered seniority provisions incorporated into a collective bargaining agreement. A unilateral

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[417] *See id.* at 864 (ruling that the district court should not have authorized the sheriff to release prisoners in violation of a state law that barred such early release until the court had made findings that other remedial alternatives were inadequate to rectify the constitutional violations); *see also* Badgley v. Santacroce, 800 F.2d 33, 37–38 (2d Cir. 1986) (upholding the terms of a consent decree that established an inmate population limit in which county defendants suggested, but did not show conclusively, that compliance with an inmate cap might violate state law).

[418] *See* 801 F. Supp. 466, 470–71 (D. Kan. 1992) (rejecting a proposed amendment to a consent decree that called for the creation of a Jail Control Authority to assume some of the exclusive duties given to the county sheriff under Kansas statutes). The *Woodson* court cited *Missouri v. Jenkins*, 495 U.S. 33 (1990), for the principle that "a court's equitable remedial power must be tempered by a 'proper respect for the integrity and function of local government institutions.'" *Id.* at 470. It cited *Jenkins* for the principle that a neutral state law cannot be set aside unless the district court has first assured itself that other permissible alternatives are nonexistent. *See id.*

[419] *See* LaShawn A. v. Barry, 144 F.3d 847, 852–55 (D.C. Cir. 1998) (rejecting a district court's modification of a consent decree that authorized a general receiver, appointed by the court to oversee consent decree implementation, to disregard local law that interfered with the receiver's discharge of its responsibilities); Stone v. City & County of San Francisco, 968 F.2d 850, 863–64 (9th Cir. 1992) (rejecting a district court's modification of a consent decree that authorized the sheriff to disregard state laws restricting the participation of inmates in furlough programs and their early release); *cf.* United States v. Alex Brown & Sons, Inc., 963 F. Supp. 235, 240–42 (S.D.N.Y. 1997) (upholding proposed consent provision that barred taped recordings of stock trader conversations made for law enforcement purposes from admission as evidence in civil processes and stating that parties to consent decrees cannot agree to disregard valid state laws).

[420] 961 F.2d 1335 (7th Cir. 1992).

change in the terms and conditions of employment by the consent decree parties was found to abrogate the unions' entitlement status under Illinois state law to bargain collectively.[421] The court emphasized that "altering the contractual (or state-law) entitlements of third parties"[422] could not be done in the absence of a district court finding that the "change [was] necessary to an appropriate remedy for a legal wrong."[423] Similarly, in *United States v. Board of Education*,[424] the Seventh Circuit Court of Appeals refused to modify a thirteen-year consent decree to override a state balanced budget requirement.[425] The Chicago Board of Education had argued that it could not comply with this law and simultaneously remedy racial and ethnic segregation in Chicago's public schools pursuant to the consent decree.[426]

4. *The Judiciary Assumes a Legislative Role in Overriding State Law Limitations*

A federal court decree that empowers local officials to take actions unauthorized or prohibited by state law remains troubling because the judiciary in effect assumes the role of a state legislative body. In *Jenkins*, the Court upheld the power of a district court to compel local officials to order unauthorized taxation that contradicted state law.[427] The Court stated that "a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation."[428] The Court failed to admit, however, that the taxation upheld in *Jenkins* could only emanate from the federal judiciary because local officials lacked taxation powers in the absence of state law authorization.[429]

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[421] *See id.* at 1336.

[422] *Id.* at 1339.

[423] *Id.*

[424] 11 F.3d 668 (7th Cir. 1993).

[425] The court found that the consent decree did not specifically require the schools to remain open, and had the parties desired such an obligation, they should have stated in the consent decree. *See Board of Educ.*, 11 F.3d at 670–71, 673. See also *United States v. Michigan*, 940 F.2d 143 (6th Cir. 1993) (decided after *Jenkins*), where the Sixth Circuit invalidated the district court's modification of a consent decree to incorporate program needs, such as vocational guidance and educational counseling. The State of Michigan claimed it had intentionally excluded these programs from the earlier consent decree because program needs were already accommodated and not constitutionally required. *See id.* at 147–48.

[426] *See Board of Educ.*, 11 F.3d at 670; *see also infra* notes 504–09 and accompanying text (providing a more complete discussion of *Board of Education*).

[427] *See supra* notes 332–34 and accompanying text.

[428] Missouri v. Jenkins, 495 U.S. 33, 57 (1990).

[429] The Court cited *Von Hoffman v. City of Quincy*, as authority for empowering the

Federal courts are loath to acknowledge that their expansive remedial powers now embrace the exercise of legislative power.[430]

In *Jenkins*, the Court overlooked the effect of its ruling upon a vast body of the states' common law that defines the scope of local power. This law, in effect for well over a century, rests upon a foundation that treats a local government as a creature of a state that lacks power to act without state authorization.[431] Local governments, as agents and political subdivisions of a state, enjoy only those powers that the state delegates to them.[432] In many states, the operation of a strict construction rule, known as "Dillon's Rule," further circumscribes local governmental power.[433] This rule permits a local government to exercise only those powers expressly delegated to it or those that can be implied fairly from the expressly granted powers. Dillon's Rule and the concept of plenary state control over local governments constitute the "formal background norms for state-local relationships."[434] By mandating unauthorized taxation, the Court in one sweeping blow severely undermined the structural principles, derived from nineteenth century legal theorists, that lay the foundation for the nation's law of state and local relations.

C. *Comity and Federalism Principles Bar the Imposition of Overly Intrusive Judicial Remedies*

The principles of comity and federalism impel federal courts to show sensitivity to the concerns and needs of local and state governments when ordering fiscal remedies.[435] These principles underlie the proposition that the

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federal judiciary to order unauthorized state taxation to remedy constitutional violations. *See Jenkins*, 495 U.S. at 56. The *Von Hoffman* decision, however, does not support that proposition. *See supra* note 330 and accompanying text.

[430] Justice White's majority opinion has been criticized for failing to acknowledge that the removal of the state law limits in *Jenkins* eliminated the KCMSD's grant of authority to tax and resulted in the federal judicial expansion of the KCMSD's taxation powers beyond those authorized by state law. *See* La Pierre, *supra* note 1, at 343–45; Brocker, *supra* note 1, at 758–89, 759 n.157.

[431] *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–9 (1990).

[432] Local governments must be empowered by the state's constitution or laws before they may exercise power legitimately. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) (holding that the state legislature is vested with full power to provide for the organization of and allocation of powers to local entities); *see also* MANDELKER ET AL., *supra* note 407, at 103.

[433] *See* MANDELKER ET AL., *supra* note 407, at 107–08.

[434] Briffault, *supra* note 431, at 9.

[435] *See, e.g.*, United States v. Michigan, 940 F.2d 143, 155 (6th Cir. 1991) (stating that the state's sovereign authority to operate its penal institutions is anchored in sensitive federalism principles); Jenkins v. Missouri (Jenkins II), 855 F.2d 1295, 1314 (8th Cir. 1988) (stating that

judiciary should fashion the least intrusive remedy that will remove the constitutional violation.[436] Although federal courts refer to their remedial powers as broad, they repeatedly hold that injunctive relief against a state or local agency should be no broader than necessary to remedy the constitutional violation.[437] Some courts entreat that measuring a remedy's effectiveness should be foremost on the minds of the federal judiciary.[438]

This principle of judicial restraint from imposing overly intrusive remedies precludes the federal judiciary from assuming the management of a local body's affairs or directing how it should administer its local functions.[439] This restraint on judicial oversight of local institutions does not necessarily limit a court-ordered funding program designed to remedy a constitutional violation. The court could order local funding in general terms, thereby giving the locality considerable discretion to correct the constitutional violations through the expenditure of the additional funding ordered. An order to fund a program in a specific way, however, could be construed as overly intrusive.

An argument can be made that all funding orders involve micro-management on the part of the court and therefore should be barred as overly intrusive. The widespread application of this principle, however, would prevent the federal judiciary from entertaining the bulk of institutional reform litigation that seeks to vindicate individual rights through governmental spending—funding that may be

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principles of federal-state comity apply to the process of imposing federal judicial remedies); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 434 (8th Cir. 1985) (rejecting the district court's remedial consolidation plan in school desegregation case because other remedies that take into consideration the interests of the three school districts in managing their own affairs better remove the constitutional violations); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) (opining that "federal courts must be cognizant of the limitations of federalism and the narrowness of the Eighth Amendment" when "entertaining a cause of action alleging Eighth Amendment violations in a state prison").

[436] *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 379–80 (1976) (invalidating a district court order that required the city's executive branch to submit guidelines for police handling of civilian complaints for the court's approval because principles of federalism restrain judicial interference in a city's governance of its internal disciplinary affairs); *Jenkins II*, 855 F.2d at 1314 (directing the district court to use minimally obtrusive methods in its school desegregation remedial orders); Ruiz v. Estelle, 679 F.2d 1115, 1126, 1145 (5th Cir. 1982) (opining that the court's duty to protect constitutional rights of prisoners does not confer power to administer prisons because the allocation of functions in a federal system as well as comity toward the state require a policy of minimum judicial intrusion into the management of state prisons).

[437] *See* Touissaint v. McCarthy, 801 F.2d 1080, 1086–87 (9th Cir. 1986) (citing Milliken v. Bradley (Milliken II), 433 U.S. 267, 280 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

[438] *See Touissaint*, 801 F.2d at 1087.

[439] *See* Bell v. Wolfish, 441 U.S. 520, 562 (1979) (opining that federal courts should not become enmeshed in the minutiae of prison operations unless they clearly violate the Constitution and stating that "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government").

neglected by majoritarian rule. When the federal judiciary issues funding orders, it continues to be cautious about foreclosing a local government from pursuing a suggested remedial course viewed as effective. Far less judicial restraint, however, exists with respect to school desegregation remedial orders. Because these orders typically mandate detailed remedial measures, including specific programmatic and capital facilities improvements, as well as the funding orders to finance them, the equitable principle barring overly intrusive intervention in the day-to-day management of a local facility generally does not apply to the school desegregation remedial process.[440] The Court's 1995 *Jenkins* decision did, however, signal the need for district courts to place more emphasis upon the goal of returning control to school districts.[441]

1. *Application of Least Intrusive Remedy Principle to School Desegregation Remedial Processes*

Arthur v. Nyquist[442] graphically depicts how judicially ordered funding remedies in school desegregation cases can clash with federalism concerns. The district court ordered *Milliken II*-type remedies, including magnet schools, that were designed to encourage greater racial balance in Buffalo, New York schools through voluntary rather than mandatory pupil assignments.[443] The district court judge recognized the difficulty of properly deciding the amount of funding required to implement the court's remedy without overly intruding into the administration of Buffalo's school system.[444] When an agreement could not be reached between the plaintiff and the city defendants on requisite funding in the

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[440] For example, in *Liddell v. Missouri* (*Liddell VII*), the court acknowledged that "*detailed guidelines* for desegregating the city schools over the next four years" had been established by the settlement agreement, district court orders, and both district court and Eighth Circuit Court of Appeal opinions. 731 F.2d 1294, 1323 (8th Cir. 1984) (emphasis added). The Eighth Circuit referred to numerous committees that had been created to assist in the desegregation plan:

> They include the Desegregation Monitoring and Advisory Committee, the Magnet Review Committee, and the Voluntary Interdistrict Coordinating Council. The function of the latter committee is to coordinate and administer the student transfers, the voluntary teacher exchanges and the part-time educational programs. A Recruitment and Counseling Center has also been established. Each of these committees and the Center fulfill important functions in the desegregation process and may be continued and funded in accordance with the settlement agreement at the discretion of the district court.

Id.

[441] *See* Missouri v. Jenkins, 515 U.S. 70, 102 (1995); Morantz, *supra* note 111, at 262.

[442] 712 F.2d 809 (2d Cir. 1983).

[443] *See id.* at 811–13.

[444] *See id.* at 812–13.

1981–82 school year, the city appealed the district court's order for additional funding.[445]

On appeal, the Second Circuit Court of Appeals first noted the sizable cost of a magnet school plan that did not rely on extensive busing.[446] The court recognized the extra budgetary strain placed upon Buffalo taxing entities resulting from the remedial order that required a "combination of magnet schools, early childhood centers, and special academies; pairing and clustering of schools; and a general upgrading of the school system to provide appropriate educational opportunities."[447] The court further acknowledged that the imposition of these costs forced the judiciary to mediate differences between the Board of Education and the city's taxing entities.[448] Noting the trend of school authorities to use desegregation lawsuits as leverage to secure additional funding otherwise unavailable due to taxpayer resistance, the court examined whether findings supported the Board of Education's claimed financing needs.[449]

Second, the Court of Appeals in *Arthur v. Nyquist* recognized the legal difficulties inherent in the implementation of a quality education plan. A district court judge cannot easily determine whether the quality related remedies sought by school district officials solely address the constitutional violations or whether they constitute additional, desirable funding not needed to implement the court's remedy.[450] The court suggested the district court take these following steps to determine the amount of mandatory school desegregation funding: (1) analyze whether the requested funding level and plan fulfills desegregation remedial needs or whether it may generally be characterized as requests for improvements unrelated to school segregation and (2) make detailed findings of the remedial purposes served by the sought funds in order to facilitate appellate court review.[451] To evaluate the justification for the proposed financing, the court expressed the desirability of itemizing both the requested additional funding and the expenditures planned in the absence of the requested funding.[452]

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[445] *See id.* at 810–11.

[446] *See id.* at 811. The Second Circuit Court of Appeals affirmed an order of the district court that the City of Buffalo be required to appropriate an additional $7.4 million for inclusion in the city's board of education budget to implement school desegregation remedies. *See id.* at 814.

[447] *Id.* at 811.

[448] *See id.* at 813.

[449] *See id.* at 812–13.

[450] *See id.* The court also expressed concern that ascertaining the correct amount of remedial funding could involve excessive intrusion into school administration operations and details. *See id.* at 812.

[451] *See id.* at 813.

[452] *See id.* at 814.

2. *Application of Least Intrusive Remedy Principle to Eighth Amendment Remedial Processes*

Whereas the federal judiciary's school desegregation decrees involve judicial oversight of minute public school operations, as seen in *Jenkins*,[453] federal courts frequently state that the implementation of a remedy for an Eighth Amendment constitutional violation should avoid judicial micro-management.[454] District courts overseeing mandated prison reforms are admonished not to order overly intrusive remedies, which include the judicial commitment of local resources.[455]

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[453] In *Jenkins v. Missouri*, District Court Judge Russell G. Clark acknowledged that the remedial part of a school desegregation case exceeds all other forms of litigation in complexity and duration. *See* 639 F. Supp. 19, 23 (W.D. Mo. 1985) (citing Armstrong v. Board of Sch. Directors of City of Milwaukee, 616 F.2d 305, 324 (7th Cir. 1980)). The *Jenkins* remedial plan included the goal of increasing the KCMSD's rating of AA to AAA. *See id.* at 26. To achieve AAA standards, the court specified that the KCMSD needed to take the following actions: (1) hire 13 certified librarians for the elementary school libraries, (2) increase the amount of time allocated to teacher planning by hiring additional teachers, (3) schedule art, music, and physical education classes for at least 60 minutes a week taught by teachers with the proper subject matter certification, (4) hire a total of 54 additional art/PE/music teachers, and (5) hire elementary and secondary level counselors. *See id.* at 26–28.

Other remedial steps included the following: (1) reducing elementary and secondary school class size, (2) implementing a summer school program to provide additional learning time, (3) providing full day kindergarten throughout the KCMSD to all willing to participate, (4) implementing early childhood development programs that incorporated early language development and other specific components, (5) implementing plans to foster real educational change by cooperation among patrons, parents, teachers, and administrators at the local school level, (6) implementing magnet school programs, (7) establishing a staff development program, (8) implementing a reasonable student reassignment plan, (9) seeking voluntary interdistrict transfers of students, (10) making capital improvements, (11) hiring additional administrators to implement the desegregation plan, and (12) creating a Monitoring Committee to oversee school desegregation implementation. *See id.* at 28–43. The court further ordered that specific amounts of money be allocated by the state and the KCMSD for each of the components of the desegregation plan over several years. *See id.* at 43–44.

[454] *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 404, 407–08 (1989) (upholding federal regulations that authorized withholding outside publications from prisoners who were deemed detrimental to prison security because deference should be accorded to the expertise of prison officials and opining that the validity of such regulations should be based on whether they reasonably relate to legitimate penal interests); Bell v. Wolfish, 441 U.S. 520, 561–62 (1979) (holding that constitutional rights of incarcerated pretrial detainees may be limited by the legitimate policies of penal institutions to maintain internal security and opining that prison officials' decisions should be granted deference because they, rather than the judiciary, are charged with the duty to administer prisons).

[455] In *United States v. Michigan*, 940 F.2d 143 (6th Cir. 1991), for example, the Sixth Circuit Court of Appeals held that the district court overly intruded upon the sovereignty of Michigan by ordering modifications to a consent decree that mandated the incorporation of certain program requirements into Michigan's security classification system for inmates and dictated new validation procedures. *See id.* at 157–60. Quoting in part from *Procunier v.*

In *Newman v. Alabama*,[456] for example, the Eleventh Circuit Court of Appeals struck down a district court order mandating the release of prisoners to relieve overcrowding in Alabama county jails.[457] The court concluded that the district court impermissibly interfered with the state's prerogative to administer its prison system when it determined which prisoners should be released.[458]

In remedying prison deficiencies, courts consistently refer to the limitations imposed by comity and federalism principles as necessitating deference to prison administrators in devising an order that will remedy constitutional violations.[459] Several federal courts have ruled that although the cost of a remedy to correct unconstitutional prison conditions cannot preclude its use, the federal judiciary should make a cost impact analysis before imposing an expensive remedy.[460]

Martinez, 416 U.S. 396, 405 (1974), the appellate court opined that district courts should "avoid intrusion, either directly or indirectly through special masters, independent experts, or other extraneous participants, into the realm of 'expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the [state] legislative and executive branches of government.'" *Id.* at 160 (citation omitted).

[456] 683 F.2d 1312, 1321 (11th Cir. 1982).

[457] *See id.* at 1314, 1321.

[458] *See id.* at 1321 (stating that equitable relief in the form of an injunction should not have been ordered before utilization of the district court's less intrusive contempt power). In *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), the Ninth Circuit Court of Appeals stated: "[t]he duty to protect inmates' constitutional rights, however, does not confer the power to manage prisons, for which courts are ill-equipped, or the capacity to second-guess prison administrators. Federal courts should not... become enmeshed in the minutiae of prison operations." *Id.* at 1086; *see also Bell*, 441 U.S. at 562 (warning that discarding a "hands off" approach to prison administration could dislodge the authority that the Constitution places in the nonjudicial branches of government to operate prisons); Morgan v. McDonough, 540 F.2d 527, 534–35 (1st Cir. 1976) (upholding school desegregation remedies that displaced some decision-making power of elected school committees, but indicating that this step was warranted only by the "most compelling circumstances," which were found in the local officials' failure to give effect to the court's desegregation orders).

[459] *See Michigan*, 940 F.2d at 167 (holding that the district court had imposed overly intrusive prison administrative procedures). The Sixth Circuit Court of Appeals further opined: "The unabridged teachings of the Court convey the Court's own unequivocal commitment to and its adamant recognition of the state's sovereign authority to operate its penal institutions. Anchored in the sensitive principles of federalism, this sovereign authority is a prerogative of the state, not a privilege recognized through comity." *Id.* at 155. See also *Knop v. Johnson*, 685 F. Supp. 636, 637 (W.D. Mich. 1988), in which the district court judge acknowledged that in imposing the least intrusive remedy available to correct unconstitutional conditions in prisons he attempted "to abide by the... precepts of comity and federalism...."

[460] *See* Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982) (ruling that federal courts, in framing a remedy to correct unconstitutional prison conditions, must consider the cost of compliance and legitimate prison security needs); Wright v. Rushen, 642 F.2d 1129, 1134 (9th Cir. 1981) (ruling that a reviewing court must have evidence that the district court focused on the impact of its remedies on prison security and the resources of the state in correcting unconstitutional prison conditions).

Such an analysis forces a district court to evaluate both the expense of the proposed remedial plan and its effectiveness in redressing the plight of the plaintiffs.[461]

3. *Greater Recognition of Federalism and Comity Principles Needed in Devising Remedial Action to Desegregate Public Schools*

Why does the federal judiciary stress greater judicial restraint in devising remedies to address Eighth Amendment violations than in seeking to implement school desegregation plans? One answer may be that racial segregation constitutes a far more intractable problem to rectify than does the correction of prison conditions.[462] The pernicious effects of racial discrimination remain highly visible. In contrast, the fear of crime continues to traumatize the nation, and the protection of prisoners' rights does not receive strong voter support. The appointment of more district court judges with conservative views, however, may decrease federal court interventionist remedies on behalf of public school children.[463]

Swann's rhetoric offers another explanation for the paucity of comity and federalism concerns expressed by federal court judges when ordering school desegregation remedial guidelines. This opinion ushered in authorization for the exercise of broad remedial powers to achieve school desegregation without referring to policies supporting comity and federalism.[464] The Supreme Court's pronouncements on permissible remedial processes to correct Eighth Amendment violations, however, have affirmed the necessity to take comity and federalism policy issues into consideration.[465]

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[461] *See Wright*, 642 F.2d at 1134.

[462] *See* ELY, *supra* note 14, at 78, 80–82, 86 (supporting the power of the Court to protect minority rights from majority rule).

[463] *See, e.g.*, Mickey Edwards, *The Need to Understand the Conservative Identity*, CHRON. OF HIGHER EDUC., Sept. 5, 1997, at B4–B5 (asserting that conservatives oppose the concept of redistributing wealth and are less inclined to strive for equal outcomes or progressive taxation); Rorie Sherman, *The Lawyers in the Three-Decade Effort to Desegregate Schools Have Staying Power*, NAT'L LAW J., Dec. 3, 1990, at 1, 31 (asserting that plaintiff lawyers in desegregation cases face a generally conservative federal judiciary that they view as hostile to civil rights now that school desegregation efforts have passed through the following three phases: liability (early 1960s), remedy (begun in early 1970s), and compliance (further expansion of the remedy phase through enforcement of standards and allocation of costs for integration and educational enhancement)).

[464] *See, e.g.*, United States v. Missouri, 515 F.2d 1365, 1372 (8th Cir. 1975) (relying upon language in *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45 (1971), to disregard state law limitations in devising school desegregation remedies).

[465] *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 392–93 (1992) (overturning the district court's denial of a sheriff's request to modify a consent decree to allow double bunking in some newly created jail cells); Knop v. Johnson, 685 F. Supp. 636, 637 (W.D. Mich.

The Court's admonitions about overly intrusive Eighth Amendment remedies seem equally applicable to school desegregation court decrees designed to equalize educational opportunities for racial minorities because those remedies are by nature intrusive. Even public school experts are unable to agree on the standardization of methods necessary to meet the goals so eloquently set forth in *Brown I*. In fact, imposing programmatic remedies, whether to improve the quality of public education or prison conditions, involves more infringement upon local discretion than improving the physical and environmental conditions in school or prison facilities. Prison reform litigation focuses more frequently, however, on the improvement of prison facilities than on the psychological well-being or rehabilitation of prisoners.

IV. THE STATE JUDICIARY'S FISCAL REMEDIAL APPROACHES TO CORRECT CONSTITUTIONAL VIOLATIONS

Part III evaluated the federal judiciary's fiscal remedial approaches. Part IV examines and contrasts the principles constructed by state judiciaries to guide their imposition of fiscal remedies. The state courts adhere more closely than their federal counterparts to separation of powers principles when remedying state and local constitutional violations. Consequently, state court correction of constitutional violations requiring public expenditures results in far less intrusion upon the legislative processes than the imposition of federal fiscal remedies.

A. *State Monetary Remedies Ordered Only for Clear Constitutional Violations*

In the absence of a clear constitutional violation, state courts refrain from ordering the appropriation of money to meet litigants' appeals for judicially ordered funding.[466] In this era of reduced public funding, individuals, interest

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1988) (holding that the precepts of comity and federalism are applicable in devising the least intrusive remedy available to correct unconstitutional conditions in prisons). The Court in *Rufo* admonished the district court to take a flexible approach in tailoring modifications to consent decrees in institutional reform litigation. *See Rufo*, 502 U.S. at 391–93. The Court stated that the public interest and the separation of powers within the federal system require district courts to defer to local government administrators who have primary responsibility for solving problems addressed in institutional reform lawsuits. *See id.* at 392. District courts appropriately should consider the impact of financial constraints in tailoring a consent decree modification. *See id.* at 392–93.

[466] *See, e.g.*, State v. Brooke, 573 So. 2d 363 (Fla. Dist. Ct. App. 1991) (holding that the court would have exceeded its authority if it had ordered funding in excess of amounts appropriated by the legislature for placement of children in psychiatric/therapeutic residential facilities); State *ex rel.* Marshall v. Blaeuer, 709 S.W.2d 111 (Mo. 1986) (holding that a circuit judge lacked authority to order the state to provide legal services to inmates in the absence of a statutory or common law rule authorizing such assistance).

groups, and local governmental units institute lawsuits against the state, or its subdivisions, hoping that the judiciary will order the defendants to fund services the plaintiffs deem necessary. By adhering to separation of powers principles, state courts steer away from performing legislative functions that involve the allocation of scarce public dollars.[467] Federal courts remain much more susceptible to such appeals in adjudicating institutional litigation claims against state and local governments. Relying upon its perceived power under the Supremacy Clause, the federal judiciary overlooks how the intrusive nature of some remedial actions expands judicial power into the legislative realm. When asked to order the expenditure of unappropriated federal funds, federal courts traditionally show, however, as much deference to Congress's power of the purse as state courts give to their state legislatures.[468] The federal courts' deference to Congress likewise extends to local governmental requests of the federal judiciary to order congressional spending for favored local projects.[469]

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[467] *See* Southeastern Pa. Transp. Auth. v. Association of Community Orgs. for Reform, 563 A.2d 565 (Pa. Commw. Ct. 1989) (overruling a court of common pleas order enjoining transit fare increases because the judiciary had no power to perform the legislative role of determining the amount of the transit subsidy). The court stated that "[t]he judiciary cannot grant [the transportation authority] the power to tax, nor can it impose a tax itself." *Id.* at 573.

[468] *See* Rochester Pure Waters Dist. v. EPA, 960 F.2d 180 (D.C. Cir. 1992) (overturning a district court order to an executive agency to allocate funds for the construction of a sewage treatment plant). Because Congress rescinded the appropriation for this grant program, such an order, according to the appellate court, would in essence constitute an appropriation for which the judiciary lacks authority. *See id.* at 184. The court stated:

> The Appropriations Clause of the Constitution vests Congress with exclusive power over the federal purse: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." . . . The clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."

Id. at 185 (quoting Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) and U.S. CONST. art. I, § 9, cl. 7); *see also* NAACP, Boston Chapter v. Kemp, 721 F. Supp. 361, 367–68 (D. Mass. 1989) (refusing to order HUD to fund affordable desegregated housing and additional rent subsidies as a remedy for HUD's failure to administer in compliance with Title VII of the Civil Rights Act of 1968). The court stated that a federal court order to provide such funding is barred by sovereign immunity and opined that the appropriation of funds rests exclusively in Congress. *See id.* at 367–68. Likewise, in *Sodus Central School District v. Kreps*, 468 F. Supp. 884 (W.D.N.Y. 1978), the district court held that it lacked power to issue a mandatory injunction directing the Secretary of Commerce to award funds under a federal grant program to plaintiff school district because the power of appropriation is vested solely in Congress. *See id.* at 885–86.

[469] In *Kreps*, a local school district sued the Secretary of Commerce alleging that its application for funding under the Local Public Works Capital Development and Investment Act of 1976 had been arbitrarily denied. *See Kreps*, 468 F. Supp. at 886. The court found that the secretary had discretionary authority to make these statutory grant awards. *See id.* Any court order that awarded plaintiff a grant was viewed as violating Congress's constitutional power to

B. *Compliance with State Fiscal-Law Limitations*

1. *State Legislative Appropriation Requirement Limits State-Court Remedial Processes*

Generally, all states require an appropriation by their legislative bodies prior to the expenditure of funds. The appropriation limits spending to a specific amount for a stated purpose.[470] Simply stated, the legislative appropriation sets the maximum dollar amount that may be spent for a particular purpose. Absent authorization, funds may not be expended. The appropriation requirement stems from the public policy to make known the purposes for which public funds are spent and to ensure that expenditures are made only for authorized purposes pursuant to an adopted budget and revenue plan.

State courts have ruled steadfastly that under no circumstances may the judiciary direct the legislative branch to appropriate funds to rectify an adjudicated duty.[471] These courts take a strict separation of powers approach, holding that the power and authority to appropriate funds lies exclusively within the legislative branch.[472] Although a substantive right to receive payment of an

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make appropriations. *See id.*

[470] *See In re* Karcher, 462 A.2d 1273, 1277 (N.J. Super. Ct. App. Div. 1983) (defining an item of appropriation as authorization for "the spending or disbursement from the treasury of money for a specific purpose").

[471] *See, e.g.*, City of Ellensburg v. State, 826 P.2d 1081, 1084 (Wash. 1992) (holding that while the state had a statutory obligation to reimburse a city that provided fire protection services to protect state property located in the city, the court, in the absence of constitutionally mandated funding, will not direct the legislature to act because the extent of such funding is a legislative prerogative); City of Camden v. Byrne, 411 A.2d 462, 470 (N.J. 1980) (affirming the denial of a court order directing the legislature to appropriate funds for anticipated statutorily funded state aid to municipalities because courts cannot redress the legislature's refusal to exercise its constitutional power over appropriations).

State courts also reason that state constitutional provisions barring the payment of state monies from the treasury in the absence of an appropriation interdict judicial appropriation. In *Gallena v. Scott*, 94 A.2d 312 (N.J. 1953), an employee sought an order from state judicial and budgetary officials for the payment of alleged additional back wages after the legislature had appropriated a sum to be paid to him. *See id.* at 313. The court affirmed the dismissal of the complaint holding that the state constitution prohibited the payment of money from the state treasury unless appropriated by law. *See id.* at 315. The court stated that judicial authority cannot "compel an appropriation." *Id. But see* Salinas Union High Sch. Dist. v. Honig, 5 Cal. Rptr. 2d 626, 633–35 (Cal. Ct. App. 1992) (upholding court-ordered payments from available appropriations to reimburse school districts for driver's training program when political infighting between the executive and legislative branches caused the state to abandon a 37 year reimbursement practice authorized by state statutes). The court found that the school districts had vested rights to such reimbursement. *See id.* at 633.

[472] *See, e.g.*, McDunn v. Williams, 620 N.E.2d 385, 396 (Ill. 1993) (holding that lower court's decision to permit two judicial candidates in an election contest to fill one judicial vacancy raised serious separation of powers problems because unless the legislature created an

adjudicated obligation against a state or local government may exist, state courts continue to rule that the judiciary lacks the power to order the legislative branch to make such a payment. As a result, no other practical remedy exists unless the legislature willingly appropriates funds for payment of the obligation.[473]

State courts perceive that their role lies in pointing out a governmental entity's breach of legal duties or its unauthorized actions rather than in directing the legislative branch to appropriate funds to meet these obligations.[474] The judiciary recognizes that orders to make an appropriation lead to a direct confrontation between the legislative and judicial branches because the legislature may refuse to appropriate the funds. State courts also express concern that a judicial order to appropriate funds is fiscally unsound because the existing state budget may not contemplate or include judicially ordered expenditures.[475]

Although the judiciary does not possess the power of appropriation,[476] a judicial order to appropriate funding may be upheld if necessary to preserve the integrity of the judicial branch. Some state courts will order legislative appropriations deemed essential to preserve the independence of the judicial branch. For example, state courts have ordered appropriations to fund otherwise

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additional circuit court position, no appropriated funds existed to pay both candidates); Rolla 31 Sch. Dist. v. Missouri, 837 S.W.2d 1, 3–4 (Mo. 1992) (affirming trial court's decision that it lacked authority to direct the legislature to fund special educational services, an area in which the legislature is entitled to supremacy by reason of the separation of powers doctrine).

[473] *See* State *ex rel.* Dep't of Corrections v. Peña, 855 P.2d 805, 808–09 (Colo. 1993) (holding that trial court lacked power to order a legislative appropriation to satisfy a judgment against the State in favor of the City of Denver, which was entitled to $835,136 for housing state-sentenced prisoners pursuant to a statutory reimbursement plan).

[474] *See Rolla*, 837 S.W.2d at 7–8 (holding that while the judiciary may point out how the legislature's funding of a mandatory preschool special program is invalid, it may not dictate that the legislature fund the program in a certain way); County of Gloucester v. New Jersey, 606 A.2d 843, 848 (N.J. Super. Ct. App. Div. 1992) (giving the State defendant a one-year period in which to remedy overcrowded prison facilities and stating: "Our function is to point out when legal authorization has been exceeded, not to direct what is essentially a legislative or executive remedy.").

[475] In *City of Camden v. Byrne*, 411 A.2d 462 (N.J. 1980), the court stated that a judicial order to appropriate money would be a fiscally imprudent measure that would "tend to tilt the budget toward imbalance" and would create debt in violation of the state's constitutional debt limit. *Id.* at 471–72.

[476] In *State v. Brooke*, for example, the court held that separation of powers principles prohibited the state judiciary from ordering a state department to provide funding for the placement of emotionally disturbed children when appropriations were insufficient to cover such expense. *See* 573 So. 2d 363, 369 (Fla. Dist. Ct. App. 1991). The court stated that such an order was in "derogation of the legislature's prerogative to make appropriations." *Id.* 370; *see also* Franklin v. New Jersey Dep't of Human Servs., 543 A.2d 56, 63 (N.J. Super. Ct. App. Div. 1988) (upholding a state regulation that established a five month maximum for emergency shelter assistance and opining that courts lack power to require executive departments to seek appropriations, a power reserved exclusively to the legislature).

inoperable judicial functions[477] or to ensure payment of adjudicated monetary obligations,[478] including both the payment of legal fees[479] and arbitration

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[477] State courts have held that an inherent power lies in the judiciary to order the legislative branch to appropriate the funds necessary to make the judiciary operable as the third branch of government. This inherent power, however, exists only to rectify a minimal level of operation; it does not exist to give the judiciary its funding wish list. *See* Morgan County Comm'n v. Powell, 293 So. 2d 830 (Ala. 1974) (holding that circuit judges lack inherent powers to order the county's legislative body to put in effect the secretarial salary scale proposed by them). Different jurisdictions have established similar guidelines as to when this inherent power to order appropriations may be exercised. In *In re Alamance County Court Facilities*, 405 S.E.2d 125 (N.C. 1991), the Supreme Court of North Carolina stated:

> The court's judicious use of its inherent power to reach towards the public purse must recognize two critical limitations: first, it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power. Second, in the interests of the future harmony of the branches, the court in exercising that power must minimize the encroachment upon those with legislative authority in appearance and in fact.

Id. at 133. Further, the court stated that adherence to established procedural methods must occur unless they "stand in the way of obtaining what is reasonably necessary for the proper administration of justice." *Id.*

The reasonable necessity requirement confines the exercise of the judiciary's inherent power to those situations in which the appropriation is shown to be "for the immediate, necessary, efficient and basic functioning of the court." Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 877 (Iowa 1978) (annulling judicial order for the employment of an investigator to be attached to county attorney's office because no evidentiary record of the necessity of such employment existed); *see also* Judges for Third Judicial Circuit v. County of Wayne, 172 N.W.2d 436, 441 (Mich. 1969) (holding that the spring board for the inherent power test lies not in the "*relative need*, but *practical necessity*" for the state funding) (emphasis in the original); John C. Taggart, Note, *Judicial Power—The Inherent Power of the Courts to Compel Funding for Their Own Needs*—In re Juvenile Director, 87 Wash. 2d 232, 552 P.2d 163 (1976), 53 WASH. L. REV. 331 (1978) (discussing the strict standard established by *In re Juvenile Director* to meet the reasonable necessity requirement); Geoffrey C. Hazard, Jr. et al., Comment, *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1287–91 (1972) (discussing the limited application of the inherent power doctrine and arguing that constitutional issues would be raised by its expansion).

[478] Impossibility of performance excuses the obligation to make payment for an adjudicated obligation if severe financial hardship makes payment impossible. *See* Garcia v. City of S. Tucson, 663 P.2d 596, 598 (Ariz. Ct. App. 1983). In *Garcia*, the court stated: "Although mere financial hardship is insufficient as a defense, a complete want of funds and inability to raise them is a defense to mandamus." *Id.* at 598 (citation omitted). The court in *Garcia* ruled that the lower court should have permitted the City of Tuscon to present evidence as to its ability to levy additional taxes to pay a tort judgment rendered against it. *See id.* The city claimed that it had not budgeted funds to pay for the judgment in the 1981–82 fiscal year. *See id.* at 597.

[479] In *Mandel v. Myers*, 629 P.2d 935 (Cal. 1981), the Supreme Court of California upheld a trial court's order to an appropriate state official to pay court-awarded attorney fees

awards.[480] Courts also have ordered a local government to make expenditures mandated by the legislative branch.[481]

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from funds that the legislature had already appropriated even though the legislature had deleted a proposed appropriation for this particular purpose. The court emphasized that such constitutionally entitled fees constituted an essential part of the California justice system. *See id.* at 948. The underlying rationale, as in the payment of necessary judicial expenses, lay in the need of the judiciary to protect its functioning. *See id.* at 945–46. The court specifically stated that otherwise "our system of justice would be subordinated to the popular vote of legislators, and our constitutional bed-rock principle of separation of powers would become a shattered mass of scattered fragments." *Id.* at 948. Nonetheless, the Supreme Court of California pointed out that the order was directed to a state official, not to the legislature to "pass an appropriations bill or to undertake any other legislative act." *Id.* at 947; *see also* Mark J. Coleman, Note, Mandel v. Myers*: Judicial Encroachment on Legislative Spending Powers*, 70 CALIF. L. REV. 932 (1982).

[480] Arbitration awards have been categorized as binding contractual obligations that are enforceable against governmental bodies. *See* AFSCME/Iowa Council v. State, 484 N.W.2d 390, 395 (Iowa 1992) (holding that an arbitrator's award constituted an enforceable collective bargaining award). In *AFSCME/Iowa Council*, the court was presented with a conflict between Iowa statutes, providing that an arbitrator's award constituted a collective bargaining agreement between the parties that was enforceable as a final and binding contract and Iowa constitutional provisions prohibiting the payment of funds from the state treasury without an appropriation policy. *See id.* at 393–95. The court found that the state's obligation to perform on its contractual obligations outweighed statutory and constitutional fiscal limitations because the state's ability to function depended upon reliance that its contracts would be enforced. *See id.* at 395; *see also* Tate v. Antosh, 281 A.2d 192, 199 (Pa. Commw. Ct. 1971) (ordering the city to pay arbitration awards, incorporated into collective bargaining agreements, for the payment of disability benefits to city employees).

The payment of pension benefits to state employees likewise fits into the category of an enforceable contractual obligation between the legislature and public employees that cannot be impaired. *See* Kosa v. Treasurer of Michigan, 292 N.W.2d 452, 465 (Mich. 1980) (stating that the legislature cannot impair its contractual obligation to make pension benefit payments).

[481] Cities with a limited tax base often face mandates from state legislatures regarding the required level of services to be provided to needy residents. Should a municipality fail to provide the level of funding required by the state, some state courts will enter an order for the funding regardless of the capabilities of the municipality to fund the mandate. *See, e.g.*, City of New Haven v. Connecticut State Bd. of Educ., No. 309427, 1992 WL 369607, at *12 (Conn. Super. Ct. Dec. 2, 1992), *aff'd*, 638 A.2d 589, 601 (Conn. 1994) (upholding State Board of Education order to the city to fund a $2 million projected shortfall to meet the state's Minimum Expenditure Requirement for education and finding evidence to support the Board's conclusions including the Board's finding that the city had "failed to appropriate sufficient funds . . . to meet its legal obligation"); Greve v. County of DuPage, 532 N.E.2d 1000, 1004 (Ill. App. Ct. 1988) (upholding a writ of mandamus ordering county officials to pay vouchers incurred for the support of minors placed under the state's Juvenile Court Act after the exhaustion of the amount requested by the judiciary for inclusion in the county's appropriation ordinance); State *ex rel.* Milligan v. Freeman, 285 N.E.2d 352, 354–55 (Ohio 1972) (ruling that mandamus will be allowed to compel a board of county commissioners to annually appropriate the sums necessary to fulfill a statutory mandate to meet the administrative expenses of the county's Domestic Relations and Juvenile Court). *But see* Rolla 31 Sch. Dist. v. State, 837

In the unusual event a state court orders a legislative appropriation to carry out a judicial function, as indicated above, the court generally refuses to be specific about how the funds should be raised.[482] This lack of direction acknowledges that the legislature must make the appropriation itself before any monies may be expended to provide a judicial remedy.[483] Furthermore, state courts will attempt to avoid a direct clash with the legislative branch by ordering funding to come from a category already included as an appropriated budgetary

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S.W.2d 1, 7 (Mo. 1992) (holding that the court cannot order the legislature to fund a state mandated program in a particular way because Missouri's Constitution prohibits the state from either mandating the provision of new local services unless the state funds them or from using unrestricted funds for state mandated programs).

When the state legislature enacts legislation that establishes funding mandates for itself, as opposed to one of its local units, state courts are loath to order the state to appropriate funds to fully meet the mandate. In *City of Ellensburg v. State*, 826 P.2d 1081, 1082–83 (Wash. 1992), the Washington Supreme Court found that a statute providing for state contracts with municipalities to pay a share of fire protection services for the protection of state property did not establish a mandate to cover the full cost of the fire protection services. The court held that the trial court erred in granting a monetary judgment for past fire services provided and in ordering full funding under a formula devised by the trial court. *See id.* at 1085. The court opined that the power of appropriation, being vested in the Legislature, precluded the court from ordering a specific level of funding in the absence of a constitutional mandate. *See id.* at 1084–85.

[482] *See, e.g.*, *In re* Mandate of Funds for Gary City Ct. v. City of Gary, 489 N.E.2d 511, 512–13 (Ind. 1986) (upholding an order for an appropriation of $30 million for the repair of court facilities and requiring the presiding court to meet with city officials before the issuance of the order to consider its impact upon other interests of the unit from which the funds would be appropriated); Judges for Third Judicial Circuit of Michigan v. County of Wayne, 190 N.W.2d 228, 229–31 (Mich. 1971) (opining that the judicial branch possesses the power to mandamus an appropriation of county funds to enable the judiciary to perform its duties and upholding lower court order that simply directed county officials to "take all requisite action to appropriate, provide or make available the funds required to permit such immediate appointment and compensation of such personnel").

[483] See Essex County Bd. of Taxation v. City of Newark, 353 A.2d 535, 537, 540 (N.J. Super. Ct. App. Div. 1976), *modified*, 372 A.2d 607 (N.J. 1977), in which the court held that the city had an obligation to reevaluate its property even if a special emergency appropriation was required. The court stated:

> We are satisfied that a court may not—as the trial judge did here by authorizing seizure of moneys belonging to the municipality and ordering its application to payment of the cost of the revaluation and tax map contracts—ignore the legislatively declared public policy that an appropriation by the municipality's governing body precede any disbursement of municipal funds.

Id. at 540.

The United States Supreme Court made a comparable distinction in *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990), when it ruled that the district court should have ordered the school district to levy a tax rather than impose the tax directly from the bench.

item.[484] As a result, the legislature need not make a new appropriation for the judicially determined funding.

Although state courts generally decline to order state legislative appropriations, they do impose orders that, as a practical matter, force state legislative bodies to devise funding plans. For example, in *Robinson v. Cahill*,[485] New Jersey's Supreme Court enjoined any school expenditures throughout the state after July 1, 1976, unless the legislature improved the state's system of financing public education so as to meet the state constitutional mandate to "provide for the maintenance and support of a thorough and efficient system of free public schools. . . ."[486] Since legislators found the closing of the public schools to be politically unpalatable, the court, without ordering an appropriation, had accomplished its initial funding goal.[487]

2. *State Law Taxation and Expenditure Limitations Limit State-Court Remedial Processes*

To encourage fiscal prudence and curtail governmental spending, voters have imposed state law and constitutional limitations upon legislatures' spending, debt

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[484] *See, e.g.*, Mandel v. Myers, 629 P.2d 935, 941 (Cal. 1981) (holding that although the separation of powers doctrine may preclude the court from ordering the legislature to enact an appropriation order, the doctrine was not violated by a judicial order to state officials to pay a specified sum out of funds that the legislature had already appropriated to fund court-awarded attorney fees); Long Beach Unified Sch. Dist. v. State, 225 Cal. App. 3d 155, 180 (Cal. Ct. App. 1990) (holding that while the judiciary cannot order the legislature appropriation of funds to reimburse a school district for state-mandated expenditures to alleviate public school segregation, as required by the California Constitution, it can order reimbursement from unexpended appropriated funds generally related to the nature of the costs incurred without violating the separation of powers doctrine); State *ex rel.* Sikeston R-VI Sch. Dist. v. Ashcroft, 828 S.W.2d 372, 376–77 (Mo. 1992) (upholding the state governor's withholding of amounts appropriated for free public schools as funds to be used to cover court-ordered school desegregation expenditures because desegregation expenditures constitute state expenditures for free public schools).

In *Butt v. State*, 842 P.2d 1240, 1260 (Cal. 1992), the Supreme Court of California reconfirmed that *Mandel* is a narrow and limited exception to the general rule that the judiciary cannot order appropriations. In *Butt*, the court held that the trial court invaded the exclusive legislative power of appropriation when it ordered the diversion of appropriated funds for purposes other than those intended by the legislature. *See id.* at 1262–64.

[485] 358 A.2d 457 (N.J. 1976).

[486] *Id.* at 459–60; *see also* N.J. CONST. art. VIII, § IV, ¶ 1.

[487] *See* Crain v. Bordenkircher, 376 S.E.2d 140, 142 (W. Va. 1988) (ordering the closing of a state penitentiary by July 1, 1992 in the face of eight years of legislative and executive inaction to correct Eighth Amendment constitutional violations); County of Gloucester v. State, 606 A.2d 843, 848 (N.J. Super. Ct. App. Div. 1992) (placing a one year limit on the state's practice of treating overcrowded prison conditions as an emergency under a state statute that authorized the housing of state prisoners in county prisons).

creation, and taxation powers. State courts' adherence to separation of powers principles dictates caution before the imposition of any judicial remedies that abrogate neutrally enacted tax and expenditure limitations. State supreme court justices frequently defer to such statutes and search for ways to craft judicial remedies to rectify constitutional violations within the existing state fiscal structure.[488] State courts have ruled that they lack the power to impose judicial remedies that would cause taxation to exceed tax limits set by state law.[489]

When state taxation and expenditure limitations hinder the judicial remedial process, state courts evaluate the public policies effectuated by the fiscal limitations and thwarted by such state law limitations. If a state court believes that the policy reasons supporting the funding of remedies to correct constitutional violations merit as much weight as the policy expressed in fiscal state law limitations, it makes every attempt to avoid a ruling that sets aside the state law limitation. Instead, the court strives to find a way to reconcile the two competing policy choices.[490]

When a state tax limitation prevents a municipality from satisfying a tort judgment against it, courts must reconcile the conflicting policy of fiscal prudence

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[488] *See* Magnolia Sch. Dist. No. 14 v. Arkansas State Bd. of Educ., 799 S.W.2d 791, 793 (Ark. 1990) (upholding the legislature's inclusion of a line item appropriation for funding federal court mandated desegregation costs as part of the Public School Fund Act so as to avoid a conflict with a prescribed state statutory formula); Duran v. Lamm, 701 P.2d 609, 613 (Colo. Ct. App. 1984) (upholding a trial court order requiring state officials to pay 42 U.S.C. § 1988 attorney fees out of funds already appropriated as compatible with existing state law because the state legislature was not ordered to appropriate money and the state constitution provided that monies in the state treasury could be disbursed if "otherwise authorized by law. . . .") (quoting COLO. CONST. art. V, § 33).

[489] In *State ex re. Emerson v. City of Mound City*, 73 S.W.2d 1017 (Mo. 1934), the Missouri Supreme Court pointed out that whereas a tax limit is no barrier to the imposition of a tort judgment against a municipality, it bars every kind of taxation beyond the limit set including taxes levied for the collection of a judgment. *See id.* at 1021–22. The court endorsed the policy reasons state tax limits effectuate: they limit taxation rates and the power to incur debt beyond the annual revenue stream raised by taxation so that the municipality stays within its budget. *See id.* at 1024. The court noted that only the state legislature could vest municipalities with the power to tax above the limit, a power that was not exercised in this case. *See id.* at 1025–27.

[490] *See* San Francisco Taxpayers Ass'n v. Board of Supervisors, 828 P.2d 147, 155–56 (Cal. 1992) (holding that the city was barred from excluding its contributions to employees' retirement fund from the state constitutional spending limit because the limitation's purpose was to limit the overall growth of governmental appropriations); State *ex rel.* Nat'l City Bank v. Board of Educ. of Cleveland City Sch. Dist., 369 N.E.2d 1200, 1203–04 (Ohio 1977) (holding state fiscal policy requiring governmental entities to pay debt service on indebtedness before paying operating expenses enhanced entities' credit standing and did not hinder the implementation of a constitutionally mandated school desegregation plan); Savage v. Munn, 856 P.2d 298, 304 (Or. 1993) (upholding constitutional tax limit upon the amount of taxes allowed to be raised for public schools against an Equal Protection Clause challenge because property tax limits serve a legitimate state interest and are entitled to deference by the courts).

against the desirability of making municipalities responsible for the payment of their tort judgments. A municipality that can escape the payment of judgments against it offers fewer incentives to its employees or agents to minimize negligent acts. Rather than set tax limits aside, a few courts have either held that tax limitations do not apply to such judgments[491] or have interpreted such limitations to include an exception for the collection of judgments in tort.[492] The latter disregard of state law restrictions to satisfy tort judgments, occurring in only a handful of states, has been cited as support for the federal judiciary's order of taxation in excess of state law in *Jenkins* and *Liddell*.[493] No federalism issues are raised, however, by these state court decisions interpreting state law.

3. *Fiscal Crises Do Not Excuse Adherence to Taxation and Expenditure Limitations*

When a municipality pleads that a fiscal crisis should excuse it from compliance with a state constitutional limitation upon its taxing and expenditure powers, the judiciary generally refuses to relax the constitutional prohibition.[494] For example, when the municipal bond market refused to open its doors to New York City in the 1970s, causing a severe financial crisis that reverberated around the world, New York's Court of Appeals interpreted state constitutional restraints to mean what the state constitution's plain language dictated.[495] The court's agreement with the policy expressed in the limitations was clear: strict interpretation of the restraints gives investors greater confidence that municipalities will not be excused from abiding by the fiscal practices the state constitution prescribes.[496]

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[491] *See* Garcia v. City of S. Tucson, 663 P.2d 596, 598 (Ariz. Ct. App. 1983) (holding constitutional tax limitations on property tax increases inapplicable to involuntary indebtedness created from a tort judgment); La Pierre, *supra* note 1, at 373–75.

[492] *See* City of Catlettsburg v. Davis Adm'r, 91 S.W.2d 56, 60 (Ky. Ct. App. 1936) (writing an exception into the constitution for the collection of tort judgments from the otherwise operative prohibition against a levy by fourth class cities of a tax in excess of $.75 on $100 of taxable property because a contrary ruling would remove incentives to prevent negligent municipal acts); La Pierre, *supra* note 1, at 373–75.

[493] *See* La Pierre, *supra* note 1, at 373–75.

[494] *See* Bethlehem Steel Corp. v. Board of Educ. of City Sch. Dist. of Lackawanna, 378 N.E.2d 115, 116–17 (N.Y. 1978) (declaring statutes unconstitutional that authorized municipalities and school districts to treat certain expenses as capital items in order to circumvent the constitutional limitation upon the amount of revenue that may be raised by real property taxation).

[495] *See* Flushing Nat'l Bank v. Municipal Assistance Corp. for City of New York, 358 N.E.2d 848, 854–55 (N.Y. 1976) (invalidating the New York City Emergency Moratorium Act because the Act barred enforcement of the city's obligations to note holders in violation of a constitutional requirement that the city pledge its faith and credit to the payment of its notes).

[496] Mid-nineteenth century municipal corporations frequently loaned their credit to or

4. *State Expenditure Mandates Do Not Excuse Compliance with State Fiscal-Law Limitations*

If a state statute clearly mandates the expenditure of local funds, and the local governmental body fails to show why the mandate cannot be fulfilled within existing state law fiscal requirements, state courts usually will not excuse compliance with the mandate because the municipality lacks adequate funds to comply with it.[497] As state legislatures augment the number and amount of funding mandates passed on to different levels of government, the opportunity increases for the state courts to become enmeshed in the following controversies involving: (1) whether the state mandate has been met, (2) whether additional funding is required to meet the state requirements, and (3) whether state law tax and expenditure limitations impede the local governments' ability to fulfill such mandates.[498]

5. *Compliance with State Fiscal-Law Limitations in School Desegregation Cases*

In specific instances, state courts—and even the federal judiciary—have upheld compliance with state fiscal limitations even though the limitations made

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guaranteed the debt of railroads and other private entities to induce them to invest in their communities. When these private entities defaulted on their obligations, the governmental entity suffered financial losses that led to the enactment of state constitutional restrictions upon the creation of municipal indebtedness and the loan of credit. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1110–12 (1980) (describing Judge John Dillon's advocacy of constitutional limitations and the impact of his treatise on the formation of municipal law); Gelfand, *supra* note 292, at 546–50 (explaining the origins of debt ceilings). Restrictions upon taxation date to the second half of the nineteenth century and were also aimed to curb the growth of public expenditures. *See id.* at 551–52.

[497] *See* Blaney v. Commissioner of Correction, 372 N.E.2d 770, 773–74 (Mass. 1978) (opining that Commissioner of Correction's unwillingness to incur special costs needed to improve prison conditions for inmates held in protective custody and his failure to show a lack of appropriated funds for such costs violated state mandate to treat prisoners equally). *But see* State *ex rel.* Hart v. Gleeson, 64 P.2d 1023, 1024 (Wash. 1937) (ruling that the mandatory duty to provide relief to blind persons could not be excused by exhaustion of funds levied up to the maximum amount set by the statutory tax limit and opining that only the state legislative body, not the judiciary, could relieve the county of mandated obligations).

[498] *See, e.g.*, San Francisco Taxpayers Ass'n v. Board of Supervisors, 828 P.2d 147, 155–56 (Cal. 1992) (finding that the city's annual, legally required contributions to city's employee retirement fund were includable categories of appropriations for the purpose of calculating the city spending limit imposed by Proposition 4 because the manifest purpose of the Proposition was to limit the growth of governmental appropriations); City of Worcester v. Governor, 625 N.E.2d 1337, 1338, 1342 (Mass. 1994) (finding that various state statutes and regulations imposing public educational expenses and obligations upon municipalities were not unfunded local mandates within the meaning of a tax limitation measure known as Proposition 2 1/2).

it more difficult to effectuate school desegregation remedies. These courts expressed the view that funding to correct constitutional violations could proceed best within the state's existing fiscal structure and that deviations from that structure could undermine the state's fiscal stability, thereby impairing the state's ability to correct the constitutional violations. The courts thus endorsed the policy reasons underlying state fiscal requirements and decided to abide by them even if the issue at hand could not be resolved completely.

State ex rel. National City Bank v. Board of Education[499] typifies state court reluctance to override state law limitations in the process of correcting unconstitutional school segregation. The issue before the court involved a state law limitation that required all taxing authorities, including boards of education, to give priority to the payment of debt service over general operating expenses.[500] In a school desegregation lawsuit, a federal district court had ordered the Cleveland Board of Education to keep its public schools open. Facing a cash-flow deficit forecast, the relator bank sought an order to allocate sufficient advanced tax payments to retire tax anticipation notes issued by the Board to maturity as required by state law.[501] The Ohio Supreme Court pointed out that this neutral state law limitation, if ignored, would impede school desegregation by crippling the school district's ability to borrow money.[502] The Ohio Supreme Court upheld compliance with the state law limitations because it believed that ignoring them would eviscerate the desegregation process by impairing the borrowing power of the state.[503]

The Seventh Circuit Court of Appeals, in *United States v. Board of Education*, also upheld state law fiscal restraints that affected a school desegregation remedial process. The Chicago Board of Education, while operating under a thirteen-year old consent decree that required it to remedy racial and ethnic segregation in Chicago public schools, experienced difficulties in negotiating labor contracts.[504] A state law required the Board to operate under a

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[499] 369 N.E.2d 1200 (Ohio 1977).

[500] *See id.* at 1203. The Ohio Constitution imposed a "mandatory duty upon the state and its political subdivisions to pay the interest and principal of their indebtedness before . . . current operating expenses." *Id.*

[501] *See id.* at 1201.

[502] *See id.* at 1204. The court described the state law limitation as a "vital tool in school financing because of the uneven and staggered distribution of tax revenues." *Id.*

[503] *See id.* ("It is the duty of this court to uphold state laws and state constitutional provisions designed to protect the financial integrity of state bodies."). The court further elaborated: "We cannot conceive of a power in any court to ignore neutral state law under the guise of implementing desegregation, when its action, in fact, would denigrate the desegregation process by crippling the borrowing power of the entire school system." *Id.* at 1204.

[504] *See* United States v. Board of Educ., 11 F.3d 668, 675 (7th Cir. 1993) (Cudahy, J., dissenting).

balanced budget.[505] The Board requested the district court to issue a restraining order to prohibit enforcement of this state law mandate. It argued that it had to keep its schools open, albeit without revenues to cover its expenditures, to comply with the school desegregation consent decree.[506] The district court entered the political imbroglio and granted a temporary restraining order against the enforcement of the balanced budget law.[507] The Seventh Circuit, in an opinion by Chief Judge Richard A. Posner, ruled that the issuance of the preliminary injunction constituted an abuse of discretion and vacated the injunction with instructions to dismiss the request for relief.[508] Ironically, the state legislature passed legislation resolving the impasse two days after the termination of the district court's order.[509]

V. CONSTITUTIONAL LIMITATIONS UPON THE EXERCISE OF FEDERAL JUDICIAL POWER

Brown I sparked a civil rights revolution that aspired to achieve cherished dreams for equal treatment under the law.[510] The immediate goal was to terminate state-enforced discriminatory practices.[511] Many argue that without the intervention of the United States Supreme Court, this movement would not have occurred.[512] The problems of overcoming racial discrimination cannot be disassociated, however, from enduring federalism issues.[513] While the Court's institutional reform rulings unquestionably advanced rights in need of protection,

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505 *See id.* at 669–70.

506 *See id.* at 670.

507 *See id.* at 671.

508 *See id.* at 670. The court opined that the district court judge "hoped to foster a political solution to what is, after all, a political dispute." *Id.* at 672.

509 *See id.* at 670. Perhaps the judiciary's decision to step out of the political arena served as a catalyst for the legislature to act.

510 The decision set the stage for outlawing segregation in all areas of life—from parks and other public areas to interstate transportation and interstate commerce facilities. *See* HASKINS, *supra* note 15, at 141–42. Congress responded by enacting civil rights legislation. *See id.* at 143.

511 *See* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 57–58 (1976). The memoirs of an African-American teacher describe what life was like as the 13th child of a sharecropper farmer who grew up in segregated, northeastern Georgia during the 1920s. *See* RUTH BURTON CRAWFORD, THE WOODS AFIRE: THE MEMOIRS OF A GEORGIA TEACHER BEFORE AND AFTER DESEGREGATION 1–59 (1996). The pattern of segregation remained the same in the 1940s and 1950s in the South. Coach Sank Powe, growing up as the son of a Mississippi Delta sharecropper, was not allowed to watch his white playmates play baseball in Little League games in a segregated white park. *See* POWE, *supra* note 181, at 49.

512 *See* COX, *supra* note 511, at 88.

513 *See* DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 10 (3d ed. 1984).

they required unprecedented judicial control of both state and local governmental functions.[514] Today, the Court wields enormous power,[515] both through its power of judicial review[516] and its enforcement of equitable remedies, which shape state and local governmental policy and frequently diminish the prerogatives of state legislators and officials.[517]

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514 *See* COX, *supra* note 511, at 77. The states are least able to induce federal self-restraint and protect themselves when issues are handled outside of regular political channels. *See* ELAZAR, *supra* note 513, at 174.

515 Although the Constitution's Framers viewed the Court as the least dangerous branch of government, its power has expanded steadily. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962) ("The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known."); ROBERT A. DAHL, DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE 197 (Morton Grodzins ed., 2d ed. 1972) (finding no political system with a measurable amount of democracy that has granted power to its "highest court as broad as that exercised by the Supreme Court of the United States"); ELAZAR, *supra* note 513, at 174 (stating that the Supreme Court is the federal institution that has done the most to limit the states' powers); ELY, *supra* note 14, at 45 (pointing out that the Court greatly influences how the nation functions); MCGOWAN, *supra* note 85, at 103–04 (arguing that due to the enlarged scope of equal protection and due process judicial power has become a major instrument of public policy formulation and a resource for many more citizens than in the past); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 354 (1998) (explaining how the public's disapproval of techniques to control the judiciary, such as court packing and jurisdiction stripping, resulted in the achievement of greater judicial supremacy in the post New Deal era than existed in earlier times); Frug, *supra* note 364, at 718–32 (discussing the massive impact of federal court orders upon state governments to raise or reallocate expenditures for the administration of institutions for the mentally ill or retarded, prisons, and juvenile detention systems, as well as the impact caused by the detailed judicial supervision entailed in such orders).

516 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). For a discussion of the counter-majoritarian difficulty, see BICKEL, *supra* note 515, at 16–23; DAHL, *supra* note 515, at 187–99; ELY, *supra* note 14, at 44–48. For a discussion of colonial views on the role of the judiciary, see WOOD, *supra* note 7, at 282–305. The legislative body was viewed as the sole source of law. *See id.* at 302.

517 *See* ELAZAR, *supra* note 513, at 193. United States Supreme Court decisions have removed state prerogatives in a variety of areas, including "Bible reading and school prayer, abortion policy, regulation of morals, censorship, libel, criminal rights, and environmental pollution control." *Id.* at 176 (footnote omitted). Further, the Court has made localities vulnerable to damage suits covering a wide range of subjects on the grounds of civil rights violations. *See id.* at 177.

Dean Diver concluded that institutional litigation casts the judge in the role of a powerbroker who reallocates power among private and governmental actors. *See* Diver, *supra* note 4, at 64, 77. This role "sanctions a degree of judicial intrusion into the political process that conflicts sharply with values inherent in federalism and separation of powers." *Id.* at 89; *see also* Philip B. Kurland, *Federalism and the Federal Courts*, 2 BENCHMARK 17, 21–24 (1986) (showing how the Supreme Court has contributed to the demise of federalism through rulings that limit state action).

This Part argues that the constitutional design places limitations upon the Court's choice of remedial actions.[518] Recognizing the federalism issues raised by the exercise of expansive Commerce Clause powers,[519] the Court has sought to fashion affirmative limits upon congressional regulation of the states.[520] Likewise, the Court should acknowledge that its remedial powers can be amplified so greatly as to upset the constitutional structure that separates powers among the branches and between the federal and state governments. Federalism requires the Court to set limits, albeit absent from the constitutional text, upon governmental regulatory power so as to maintain the institutional design of the constitutional structure.[521] The values served by federalism are important enough

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[518] In designing the Constitution, the Framers separated powers among the three branches of the federal government and between the states and the federal government to prevent tyranny and to make governmental operations more efficient. *See* Ann Stuart Anderson, *A 1787 Perspective on Separation of Powers*, *in* SEPARATION OF POWERS—DOES IT STILL WORK? 138, 138–39, 142–44 (Robert A. Goldwin & Art Kaufman eds., 1986); Donald L. Robinson, *The Renewal of American Constitutionalism*, *in* SEPARATION OF POWERS—DOES IT STILL WORK?, *supra*, at 38, 48. The Framers feared oppression when powers were united in one place. *See id.* at 48. They also feared tyranny from the will of the people and accordingly devised a republican government covering a large population to check smaller interest groups and incorporating a complex structure that combined separation of powers, bicameralism, judicial review, and federalism as safeguards. *See id.* at 49.

In 1978, Professor Gerald E. Frug argued that the expansion of lower federal courts' power "to remedy constitutional violations by requiring significant additional government expenditures" would require the Supreme Court "to decide what limits, . . . if any" exist upon "the judicial power of the purse. . . ." *See* Frug, *supra* note 364, at 717. Those limits have not been forthcoming, however. Professor Frug concluded that the courts would be exercising all three types of governmental power—judicial, legislative, and executive—if possessed with plenary power "to define constitutional values, command sufficient appropriations to support those values, and then control by equitable decree the spending of the money appropriated." *Id.* at 733.

[519] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 587 (1985) (O'Connor, J., dissenting). The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

[520] *See* Printz v. United States, 521 U.S. 898, 935 (1997) (barring Congress from commandeering state officials to enforce federal regulatory programs); New York v. United States, 505 U.S. 144, 188 (1992) (barring Congress from commandeering the states to enact or administer a federal regulatory program); Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (refusing to apply federal employment regulations to the states in the absence of a plain statement indicating congressional intent to make the regulations applicable to the states); Jackson, *supra* note 94, at 2213 (noting "dramatic reinvigoration by the Court of federalism-based limits on national power"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 639–52 (1993) (describing Justice O'Connor's development of an "autonomy of process principle" calling for judicial oversight of congressional power to preserve the integrity and autonomy of state governmental processes).

[521] *See* Lessig, *supra* note 368, at 192–93. Professor Jackson supports a limited judicial role in the enforcement of federalism limits. *See* Jackson, *supra* note 94, at 2224. She argues

to preserve.[522] The challenge for the Court is to articulate workable limits upon its remedial powers in a way that can be applied without inconsistency or the appearance of political influence.[523]

This Section examines the following four distinct doctrinal limitations upon the Court's remedial powers: the Constitution's federal design, separation of powers principles, comity, and the Constitution's guarantee to the states of a representative democracy. Each of these doctrines calls for equanimity in the imposition of remedial measures that severely affect state and local financial resources. While the Court acknowledges that considerations emanating from either federalism, comity, or the Constitution's separation of powers bind the judiciary to some extent, it has not ruled whether federal structural limitations or the Guarantee Clause restrict judicial power. The taxation order upheld in *Jenkins* set aside state tax law, ultimately ignoring each of these limitations upon federal power.

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that such judicial review upholds the Constitution as the rule of law and provides an incentive for Congress to weigh the impact of federal legislation upon the federal structure. *See id.* at 2224–28.

[522] *See* Jackson, *supra* note 94, at 2213–15 (summarizing the values of federalism as (1) providing opportunities for political participation, diverse cultures, experimentation, and innovation, (2) providing checks on federal government oppression, (3) maximizing choice through government competition, and (4) enhancing personal and group empowerment by providing an appellate process through multiple governmental layers); Friedman, *supra* note 94, at 389–405 (cataloguing the values of federalism as (1) increasing public participation in democracy, (2) ensuring accountability, (3) providing laboratories for experimentation, (4) protecting citizens' health, safety, and welfare, (5) preserving cultural and local diversity, and (6) diffusing power to protect liberty); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988) (finding that federalism serves the following four principal values: (1) providing a dual system of checks on abusive governmental power, (2) increasing the opportunities for citizen participation in democratic processes, (3) creating diverse cultural and political environments, and (4) enhancing the opportunities for innovation and experimentation). *But see* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1322–28 (1994) (arguing that federalism's role in securing liberty, representing minorities, and providing opportunities for participation and innovation remains debatable).

[523] *See* Jackson, *supra* note 94, at 2215–16, 2225–26; Lessig, *supra* note 368, at 192–93. When changed circumstances, more than 200 years after the framing of the Constitution, no longer provide implicit limits on federal and state power, Professor Lessig argues that the Court does and should create affirmative, implied limits, even though unsupported by the Constitution's text, in order to reconstruct the envisioned structural balance of power at the time of the Constitution's framing. *See id.* at 127–32, 214. He suggests that federalism interests can be protected from Congress's over reaching Commerce Clause power by (1) requiring Congress to be clear when it intends to intrude upon areas of intrastate economic activity, (2) inviting Congress to establish its own regime of restraint, (3) allowing states to opt out of federal regulation to preserve autonomy, but permitting other states to enjoy the benefits of federal regulation, and (4) removing jurisdiction of Commerce Clause claims from lower federal courts to one court, a commerce court, to achieve consistency. *See id.* at 206–14.

During the 1990s, the Court curbed Congress's exercise of powers that command states to take actions commensurate to those ordered by the Court.[524] In contrast to the expansive reading of its own powers in *Jenkins*, the Court has elevated federalism principles by ruling that the Tenth Amendment,[525] the Eleventh Amendment,[526] and federal structural considerations[527] limit Congress's power to interfere with state autonomy.[528] In effect, the Court has contained Congress's exercise of powers that command the states to take certain actions comparable to judicially ordered taxation.[529]

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[524] *See Printz*, 521 U.S. at 925–35; *New York*, 505 U.S. at 174–183.

[525] U.S. CONST. amend. X.

[526] U.S. CONST. amend. XI.

[527] *See* Alden v. Maine, 119 S. Ct. 2240, 2251, 2254, 2256, 2266 (1999) (finding that the Constitution's structure preserves the states' traditional sovereign immunity from private suits in their state courts); *Printz*, 521 U.S. at 905 (stating that constitutional challenges to a federal statute requiring local officials to conduct background checks on firearms purchasers should be resolved by an examination of the Constitution's structure, as well as historical understanding and practice and the Court's jurisprudence). For the *Printz* Court's discussion of the Constitution's structural protections to preserve the federal system established by the Constitution and the effect that federal control imposed by the statute would have upon state law enforcement officers, see *id.* at 918–25.

[528] *See, e.g.*, Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (holding that the Age Discrimination in Employment Act's waiver of the states' sovereign immunity from private suits did not constitute a valid exercise of Congress's power under section 5 of the Fourteenth Amendment); *Alden*, 119 S. Ct. at 2269 (ruling that Congress's Article I powers do not include the power to remove the states' sovereign immunity under the Eleventh Amendment from private suits to enforce federal law in state courts); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2233 (1999) (ruling that Congress's Article I powers do not include the power to remove states' sovereign immunity under the Eleventh Amendment from private suits to enforce federal trademark law provisions); *Printz*, 521 U.S. at 935 (ruling that Congress lacks power to require local officials to conduct background checks on firearms purchasers in furtherance of a federal regulatory program); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 56 (1996) (ruling that Congress's Article I powers do not include the power to remove the states' sovereign immunity under the Eleventh Amendment from suits by Indian tribes to enforce federal law in federal courts); New York v. United States, 505 U.S. 144, 177, 186 (1992) (ruling that Congress lacks power to compel the states to implement federal legislation by taking title to nuclear waste).

[529] Judicial taxation to increase public school revenues commands the states in a manner comparable to the congressional command to the states to take title to nuclear waste found unconstitutional in *New York v. United States*. In *Alden*, Justice Kennedy, writing for the Court, acknowledged that the judiciary possesses coercive powers that "may threaten the financial integrity of the States" through the imposition of compensatory damages, attorney fees, and punitive damages. 119 S. Ct. at 2240, 2264. *Alden* invalidated Congress's attempt to further its Commerce Clause powers by abrogating state sovereign immunity under the Eleventh Amendment in suits brought by private parties in state courts. Congress retains the power to engage in enforcement activity under section 5 of the Fourteenth Amendment. *See College Savings Bank*, 119 S. Ct. at 2224. Nonetheless, the *Alden* Court's acknowledgment that judicial processes have an impact upon the allocation of scarce resources, a process that should be left to

Because the Court restrains congressional action believed to upset the balance of state and federal power implicit in the federal structure,[530] it follows that the judiciary should be mindful as well of its own power to destroy this delicate balance.[531] Likewise, federalism, separation of powers, and comity principles remain no less applicable to the judiciary than to the other branches.[532] Furthermore, the Guarantee Clause,[533] which guarantees a republican form of government to the states, restrains all three federal branches, including the judiciary, from unduly interfering with state and local representative government.[534] The Court has acknowledged that constitutional federalism restraints exist, but in *Jenkins*, when upholding the deeply intrusive judicial imposition of taxation not authorized by state law, it failed to address such limits.[535] The Court has opined, however, on more than one occasion that the Constitution's federal design contains postulates of limitation and control.[536]

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the political branches, casts doubt upon the *Jenkins* Court's approval of judicial taxation. Justice Kennedy implied that states are bound only by obligations that "comport with the constitutional design." *Alden*, 119 S. Ct. at 2266; *see also Printz*, 521 U.S. at 935 (requiring state officers to perform background checks on handgun purchases pursuant to federal statutory law found incompatible with the Constitution's dual sovereignty structure).

[530] *See Printz*, 521 U.S. at 935 (concluding that provisions of a federal statute that commanded state officers to conduct background checks on firearms purchasers were incompatible with the Constitution's federal structure of dual sovereignty); *New York*, 505 U.S. at 177 (finding the "take title" provision of a federal statute that required states to accept ownership of nuclear waste to be inconsistent with the federal structure established by the Constitution). *But see* Kurland, *supra* note 517, at 20 (stating that throughout the Court's history, it has seldom limited congressional authority).

[531] *See* ELY, *supra* note 14, at 46 (pointing out that the formal constitutional checks on the Court, including Congress's budgetary control, impeachment provisions, withdrawal of jurisdiction over certain classes of cases, and the possibility of constitutional amendment, have been of little consequence).

[532] Professor Gerald E. Frug has analyzed the following four restraints upon judicial power: the democratic process, the federal system, the allocation of power within the federal government itself, and the Eleventh Amendment. *See* Frug, *supra* note 364, at 732–57.

[533] U.S. CONST. art. IV, § 4.

[534] The clause states that the "United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4. If the Framers of the Constitution intended to exclude the federal judiciary from the strictures of the clause, it is unlikely that the encompassing language "United States" would have been used. *See* Merritt, *supra* note 522, at 75 (concluding that the reference to the "United States" in the Guarantee Clause "plainly encompasses the judicial branch").

[535] *See* Frug, *supra* note 364, at 717 (pointing out that as lower federal courts increasingly order significant government expenditures, the Court "will have to decide what limits there are, if any, to the judicial power of the purse").

[536] The Court's references to the existence of federalism restraints include the following: (1) "The actual scope of the Federal Government's authority with respect to the States has changed over the years, . . . but the constitutional structure underlying and limiting that authority has not." New York v. United States, 505 U.S. 144, 159 (1992); (2) "[T]he text of the

A. *The Constitution's Federal Structural Framework as a Principle of Limitation*

1. *Evolution of a Federal Structural-Framework Test*

The New Deal marked the beginning of an era in which the Court generally refrained from restraining the exercise of Congress's Commerce Clause powers that reduced state and local power.[537] The Court's 1976 ruling in *National League of Cities v. Usery*[538] departed from this trend, holding that the Tenth Amendment protected the states' integral and traditional governmental powers from congressional authority under the Commerce Clause.[539] But in the decade that followed, the Court failed in its endeavor to give content to an embattled Tenth Amendment "zone of protection" from congressional intrusions.[540] In

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Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for 'behind the words of the constitutional provisions are postulates which limit and control.'" Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985) (citation omitted); and (3) "No fixed or even substantially fixed guidelines can be established as to how far a court can go [to remedy public school segregation on the basis of race], but it must be recognized that there are limits." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971); *see also* Milliken v. Bradley (Milliken I), 418 U.S. 717, 763 (1974) (White, J., dissenting) (opining that "[t]here are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases").

[537] *See* United States v. Lopez, 514 U.S. 549, 573 (1995) (Kennedy, J., concurring) (opining that the deference given to Congress began in 1937 with the decision of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)); *see also* Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. 923, 923 (1997); Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 959–60 (1997); Diamond, *supra* note 94, at 1283 (finding an erosion in confining Congress's powers to its enumerated powers since the New Deal); Lessig, *supra* note 368, at 176 (finding a waning of the Court's activism in advancing federalism interests at some time late in the 1930s or early 1940s); Powell, *supra* note 520, at 667 (stating that from the "New Deal to *National League of Cities* the Supreme Court . . . [denied] the existence of implied federalism limits on national power, a denial substantially revived by *Garcia*").

[538] 426 U.S. 833 (1976). The Court invalidated minimum wage and overtime provisions of the Fair Labor Standards Act that applied to state and local governments. *See id.* at 851–52.

[539] The Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), summarized the prerequisites for state immunity under *National League of Cities* as encompassing the following four conditions: (1) the federal statute at issue must regulate the states as states; (2) the statute must address matters that are indisputable attributes of state sovereignty; (3) compliance with the statute must directly impair the states' ability to structure integral operations in areas of traditional governmental functions; and (4) the relation of state and federal interests must not be such that the nature of the federal interest justifies state submission. *See id.* at 287–88.

[540] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530–31 (1985); Lessig, *supra* note 368, at 182–83 (arguing that the tools used by the Court in *National League of Cities* to impose limits upon federal power produced inconsistencies in application because

1985, the Court, pointing to its unsuccessful attempts to define an area of saved integral and traditional governmental functions,[541] expressly overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*[542] and returned to its post-New Deal federalism posture.

In *Garcia*, the Court held that Congress's Commerce Clause powers do not face substantive constitutional restraints.[543] If such limitations on congressional authority do exist, the Court opined, they are inherent in the political processes and cannot be derived from judicial decrees.[544] The Court expressed its belief that the structure of the federal government itself served as the primary protector of the states' continued role in the federal system.[545] By relying upon the federal government's structural processes as the rationale for its ruling, the Court elevated the role played by the Constitution's federal structure to a tool for constitutional analysis.[546]

The *Garcia* decision left the Tenth Amendment functionally dead.[547] In *New York v. United States*,[548] however, the Court breathed new life into the Tenth Amendment when it invalidated provisions of a federal statute that required states

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determining which functions were "traditional" proved unclear given the radical changes in technology since the Constitution's framing).

[541] *See Garcia*, 469 U.S. at 539, 547.

[542] *See id.* at 557.

[543] *See id.* at 550, 554. The Court stated:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Id. at 554; *see also* Jackson, *supra* note 94, at 2224 ("*Garcia* was read to mean there would be no judicial enforcement against Congress of the law of federalism.") (footnote omitted).

[544] *See Garcia*, 469 U.S. at 550–52, 554 (1985).

[545] *See id.* at 550–52.

[546] *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CA. L. REV. 1311, 1327–31 (1997).

[547] *See* Richard B. Cappalli, *Restoring Federalism Values in the Federal Grant System*, 19 URB. LAW. 493, 509 (1987) (concluding that only "political federalism" survived *Garcia*); Powell, *supra* note 520, at 634 (stating that *Garcia* "rendered explicit the New Deal rejection of federalism as a legal principle").

[548] For a discussion of the *New York* decision, see Powell, *supra* note 520, at 635–39; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); Martin H. Redish, *Doing It with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593 (1994); Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1634–55 (1994).

to "take title" to low-level nuclear waste generated within state borders if no other provision for its disposal were made.[549] Justice O'Connor, writing for the majority, stated that despite the fact that the Tenth Amendment lacks substantive content, it "confirms that [federal] power . . . is subject to limits that may, in a given instance, reserve power to the States."[550] She opined that the Tenth Amendment directs the Court "to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."[551]

Before *New York*, the Tenth Amendment was treated as a residuary clause, only prompting an inquiry as to whether the challenged congressional action fell within a delegated or enumerated power.[552] After *New York*, even Congress's

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[549] Justice O'Connor, writing for the Court, in *New York*, stated that when a litigant challenges the exercise of federal power, the Court could examine the issue in either of two ways that follows: (1) whether the congressional action fell within Congress's constitutionally delegated powers or (2) whether the action invaded state sovereignty reserved by the Tenth Amendment. *See* New York v. United States, 505 U.S. 144, 155 (1992). Justice O'Connor opined: "In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other." *Id.* at 156. O'Connor further commented:

> In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.

Id. at 159.

New York incorporated into law Justice O'Connor's distinctive view of federalism that (1) requires the federal government to respect state autonomy in the exercise of governmental processes even when the federal government possesses the power to preempt and (2) obligates the judiciary to restrain congressional intrusions on state autonomy that violate the spirit of the Tenth Amendment. *See* Powell, *supra* note 520, at 639; Yoo, *supra* note 546, at 1312 (finding that the Court has reasserted judicial review's applicability to questions concerning federalism issues and stating "*Garcia* is no longer the controlling theory concerning judicial review of federalism questions").

[550] *New York*, 505 U.S. at 157. Other Supreme Court justices continue to assert that the Tenth Amendment places no limits upon Congress's exercise of its enumerated powers. *See* Printz v. United States, 521 U.S. 898, 941–42 (1997) (Stevens, J., dissenting).

[551] *New York*, 505 U.S. at 157.

[552] *See* Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 121 (1998) (describing how *New York v. United States* transformed Tenth Amendment justiciability by subjecting Congress's enumerated powers to affirmative limits).

Powers delegated to Congress are not reserved to the states. *See* U.S. CONST. amend. X. Federalism has been described as involving the division of power between (1) the states and the federal government and (2) the federal elements contained in the central government. *See* Diamond, *supra* note 94, at 1282. The modern theory of federalism, as well as the Supreme Court's constitutional law jurisprudence, has concentrated on the allocation of powers between

enumerated powers do not escape judicially imposed affirmative limits.[553] The Tenth Amendment now directs the Court "to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."[554] The *New York* Court concluded that the take title provision failed to constitute one of Congress's enumerated powers, infringed on the "core of state sovereignty reserved by the Tenth Amendment," and conflicted with the Constitution's federal governmental structure.[555]

While *New York v. United States* departed from *Garcia*, its unique facts make it readily distinguishable.[556] The 1997 decision in *Printz v. United States*[557] confirmed, however, that *New York*'s application of a structural test[558] cannot be viewed as an aberration. The *Printz* decision demonstrates that the present members of the United States Supreme Court will invalidate congressional enactments that they consider inconsistent with the federal governmental structure created by the Constitution.[559] Justice Scalia, writing for the majority, relied

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the federal government and the states. *See id.* at 1282–83.

[553] *See* Hoke, *supra* note 552, at 121.

[554] *New York*, 505 U.S. at 157.

[555] *See id.* at 177.

[556] The take title provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 at issue in *New York* gave the states no options other than to adopt congressional regulations or take title to low-level radioactive waste. *See id.* at 176. The Court concluded that Congress lacked power to compel the states to take title to the waste, which amounted to "a congressionally compelled subsidy from state governments to radioactive waste producers." *Id.* at 175. The take title provision only applied to the states, not to private parties.

In *Printz v. United States*, Justice Stevens, in his dissenting opinion, distinguished *New York* from *Printz* as disapproving a "particular *method* of putting [a cooperative federalism program] into place, not the *existence* of federal programs implemented locally." 521 U.S. 898, 960 (1997) (Stevens, J., dissenting) (emphasis in the original).

[557] *See* 521 U.S. at 960. For a discussion of *Printz*, see generally Kevin Todd Butler, Printz v. United States*: Tenth Amendment Limitations on Federal Access to the Mechanisms of State Government*, 49 MERCER L. REV. 595 (1998); Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199 (1997); Hills, *supra* note 229; Jackson, *supra* note 94; David Liechty, Recent Development, H. Jay Printz v. United States*: Supreme Court Declares Brady Act's Review of Handgun Application Requirement Unconstitutional*, 24 J. CONTEMP. L. 178 (1998).

[558] The Court found the take title provision as "inconsistent with the federal structure of our Government established by the Constitution." *New York*, 505 U.S. at 177.

[559] In *Printz*, plaintiffs challenged the validity of provisions of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), that mandated local law enforcement officers to conduct background checks in connection with the transfer of a handgun. *See Printz*, 521 U.S. at 898. Justice Scalia, writing for the majority, stated that the Court should examine historical practice, the Constitution's structure, and the jurisprudence of the Court to decide the issue in the absence of constitutional text directly covering the question. *See id.* at 905. Thus, the Court made the Act's conformance or lack of congruence with the federal constitutional structure one of three central inquiries; *see also* Alden v. Maine, 119 S. Ct. 2240, 2246–47 (1999) (referring to "the Constitution's structure, and its history,

heavily upon structural framework considerations as the rationale for invalidating provisions of the Brady Handgun Violence Prevention Act.[560] Similarly, Justice O'Connor, in a concurring opinion, stated that the invalidated provisions of the Act "utterly fail[ed] to adhere to the design and structure of our constitutional scheme."[561] In 1999, the Court again confirmed, in *Alden v. Maine*, that "the structure of the original Constitution itself" protects a sphere of state sovereignty.[562] The Court held that Congress's Article I powers "do not include the power to subject nonconsenting States to private suits for damages in state courts."[563]

New York established an anticommandeering rule that prohibits Congress from commandeering the states to enact and carry out a federal regulatory program.[564] *Printz* extended the anticommandeering principle by holding that Congress is barred affirmatively from commanding state executive officials to administer a federal regulatory program.[565] Like *Garcia*, both *New York* and *Printz*, emphasize process-oriented judicial review in the federalism context.[566] These decisions support the proposition that Congress in exercising its Commerce

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and . . . interpretations by this Court" as the source of the states' sovereign immunity from suit); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (finding that congressional regulation of state judicial qualifications "upset the usual constitutional balance of federal and state powers").

[560] Because no constitutional text defines the essential elements of the constitutional scheme, the Court in *Printz* concluded that guidance as to the constitutionality of the Brady Act "must be sought in the historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Printz*, 521 U.S. at 905.

[561] *Id.* at 936.

[562] *Alden*, 119 S. Ct. at 2254. In *Alden*, the Court relied upon "history, practice, precedent, and the structure of the Constitution" to hold that Congress lacks power to abrogate state sovereign immunity from private suits in state courts. *Id.* at 2266.

[563] *Id.* at 2246.

[564] *See* New York v. United States, 505 U.S. 144, 161 (1992). Professor Lawrence Lessig views the anticommandeering rule as both an under and over inclusive rule that can be applied effectively to advance federalism values even though it does not directly do so. *See* Lessig, *supra* note 368, at 191–92. He finds the prohibition against commandeering, as well as the plain statement rule and the Court's recent formulation of limits upon the spending power, as "second-best tools" not derived from the Constitution's text, but imposed "in the name of a deeper fidelity with the Constitutional structure." *Id.* at 193. Professor Tushnet has predicted that *New York*'s anticommandeering rule will fail to create a solid foundation for revitalizing constitutional federalism. *See* Tushnet, *supra* note 548, at 1654. *But see* Hills, *supra* note 229, at 824–28 (criticizing the political accountability theory as a justification for the anticommandeering rule in *New York v. United States* and in *United States v. Printz* because this theory requires strict separation of state and federal functions to prevent voter confusion about which government mandates a certain policy, a separation contrary to today's cooperative federalism practices).

[565] *See Printz*, 521 U.S. at 934–35.

[566] *See* Jackson, *supra* note 94, at 2230 (supporting a "process-oriented, deliberation-forcing form of doctrine" in the judicial enforcement of federalism limits).

Clause powers cannot disrupt the Constitution's federal design by placing overly burdensome regulations upon the states.[567] This process based concern contrasts with the overruled *National League of Cities*' substantive approach that restrained Congress from acting in areas traditionally occupied by the states.[568]

In summary, the Court's recent federalism decisions reject *Garcia*'s sole reliance upon political processes to protect state and local governments.[569] But the Court continues to abide by *Garcia*'s use of structural analysis.[570] When faced with the question of whether a particular congressional act invades a state's sphere of autonomy, the Court now routinely examines whether the act at issue upsets the balance of power between the federal government and the states embodied in the Constitution's federal structure.[571] By focusing on the

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[567] *See* Prakash, *supra* note 548, at 2035 ("Congress simply cannot command a state legislature to legislate."). Although it is argued that the Constitution's text and structure suggest that Congress lacks power to commandeer state legislatures, state courts are bound to enforce the federal Constitution and laws. *See id.* at 1967–74, 2012. The Court in *Alden*, in preserving state sovereign immunity against private suits in state courts, also expressed concern about protecting the states from coercive congressional action. The Court stated:

> A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.

Alden, 119 S. Ct. at 2264.

[568] *See supra* note 539 (presenting *National League of Cities'* substantive principles); *see also* Jackson, *supra* note 94 (rejecting the substantive enclave theory of *United States v. Lopez*, 514 U.S. 549 (1995), as one that cannot be sustained on a principled, coherent basis); Lessig, *supra* note 368, at 196–97 (predicting that the limits established in *Lopez* upon Congress's Commerce Clause powers cannot be consistently applied).

[569] *See, e.g.*, *Alden*, 119 S. Ct. at 2260 (examining "history, practice, precedent, and the structure of the Constitution" to determine whether "Congress has authority under Article I to abrogate a State's immunity from suit in its own courts"); *Printz*, 521 U.S. at 905 (resolving challenge under the Commerce Clause to Brady Act's handgun transfer restrictions by examination of "historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court"); *Lopez*, 514 U.S. at 559 (stating that Congress's power to regulate under the Commerce Clause is measured by "an analysis of whether the regulated activity 'substantially affects' interstate commerce"); *New York*, 505 U.S. at 149 (determining the constitutionality of Low-Level Radioactive Waste Policy Amendments Act of 1985 by "discerning the proper division of authority between the Federal Government and the States").

[570] *See, e.g.*, *Alden*, 119 S. Ct. at 2265–67; *Printz*, 521 U.S. at 905, 918–25; *New York*, 505 U.S. at 177.

[571] *See, e.g.*, *Alden*, 119 S. Ct. at 2268 (stating that "[t]he principle of sovereign immunity . . . strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States"); *Printz*, 521 U.S. at 919–21 (holding that the Brady Act's impressment of local law enforcement officers to fulfill federally created duties upsets the Constitution's federal structure by unconstitutionally augmenting federal power); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 56 (1996) (citing Dellmuth v. Muth, 491 U.S. 223

Constitution's structure, the Court seeks to conceptualize any meaning that can be derived from the Constitution's creation of two levels of governments, each with sovereign but sometimes overlapping powers.[572]

2. *Application of a Federal Structural-Framework Test to Congress's Exercise of Power*

The federal structural-framework test requires the judiciary to decide when one of the federal branches breaches the boundary lines implicit in the Constitution's federal design.[573] The application of this test will prove no easier than determining the occurrence of a Tenth Amendment constitutional violation.[574] The Tenth Amendment provides a textual reminder that powers not granted to the federal government are reserved to the states, and the jurisprudence created by it has concentrated on the Constitution's scheme of shared power

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(1989)) (noting that Congress's powers to abrogate the states' immunity from suit are tempered by the "Eleventh Amendment's role as an essential component of our constitutional structure"); *New York*, 505 U.S. at 177 (finding take title provisions of Low-Level Radioactive Waste Policy Amendments Act of 1985 to be "inconsistent with the federal structure of our Government established by the Constitution").

[572] *See* Jackson, *supra* note 94, at 2246 (pointing out that the Constitution explicitly provides for the existence of state governments, each with a legislature, an executive authority, and courts, and imposes affirmative duties upon them).

[573] The Court has applied the structural framework test only to congressional and state relations. The test prohibits Congress from destroying the states' concurrent authority over the citizenry. *See Printz*, 521 U.S. at 919–21. In *Alden*, the Court reiterated this sentiment in its statement that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." 119 S. Ct. at 2263. Further, a structural framework test protects a core of state sovereignty. *See id.* at 2246–47 (noting that congressional removal of state sovereign immunity from private suits in state courts impinges upon a "fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"); *New York*, 505 U.S. at 177 (invalidating "take title" provision in the federal act regulating the disposal of nuclear waste as infringing upon state sovereignty and contrary to the federal structure); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (upholding the power of states to prescribe state judicial qualifications without congressional intrusion). The test restrains the states as well as Congress. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995), the Court ruled that the Constitution's structure precludes the states from adding qualifications to congressional offices.

[574] *See* Caminker, *supra* note 557, at 201–02 (arguing that identifying essential postulates governing federal-state relations from the Constitution's structure embraces a formalist approach to interpreting the Constitution, an endeavor unlikely to succeed due to the dearth of textual and structural guidelines); Powell, *supra* note 520, at 674 n.199 (concluding that the structural inference of significant state governmental autonomy must be reconciled with the structural inference of national power obligating the states to execute congressional choices "within the outer limits of federal authority").

between the states and Congress.[575] A structural test focuses more singularly on the impact made by a questionable action upon the Constitution's federal structure.[576] This test could expand beyond the Tenth Amendment's present arena of congressional and state relations to cover any governmental action that disturbs the balance of federal and state power, whether initiated by Congress or by another source of power. It makes little difference in evaluating federal-state power allocation contests, however, whether one refers to the Tenth Amendment[577] or to the Constitution's inherent structural protections as symbolic of limitations imposed upon Congress's exercise of Commerce Clause powers.[578] Both limitations represent concern for the protection of the states' continuing integrity in a federal system.

The application of a structural test requires the Court to define structural safeguards that protect the states from Congress's undue interference.[579] Whereas the Court in *Garcia* believed that the federal structure itself would shield the states from destructive congressional intrusions, the Court, as expressed in *Alden*, *Printz*, and *New York*, now professes that the structural framework does not sufficiently protect state autonomy.[580] Thus, the Court through its exercise of

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[575] *See* WILLIAM WINSLOW CROSSKEY, 1 POLITICS AND THE CONSTITUTION 677–78 (1953) (stating that the Framers believed that the structural checks and balances built into the Constitution would protect liberty without the Tenth Amendment provisions, which were adopted only to provide assurance of the states' continued existence to the citizenry).

[576] Professor Briffault has described the state's place in the federal structure as follows:

> The federal Constitution secures the continuing existence of the states within their existing boundaries. It makes the states the basic component units for the structure of the federal government and for the amendment of the federal Constitution. It also rests on the assumption that the states have inherent autonomous governmental power; that is, it assumes and, through the Tenth Amendment, assures that the states may, in general, legislate, regulate, and raise and spend revenue without having to look to the federal government or the federal Constitution for authority.

Briffault, *supra* note 522, at 1335.

[577] *See New York*, 505 U.S. at 159 (1992). Justice O'Connor opined that limitations upon power delegated to the federal government can be ascertained by "discerning the core of sovereignty retained by the States under the Tenth Amendment." *Id.*

[578] *See* Amar, *supra* note 373, at 1466 ("The language of the Tenth Amendment simply distilled the underlying structural logic of the original Constitution. . . .").

[579] Professor Briffault argues in support of judicial intervention to protect the formal features of the federal structure. *See* Briffault, *supra* note 522, at 1350–51. He identifies these features as "the guarantee of state existence, nonoverlapping boundaries, the use of states as the basic constitutive units in the national government, and the inherent law-making power of the states"; and "the protection of the states as exclusive, autonomous decision makers within guaranteed borders. . . ." *Id.* at 1351. Professor Briffault rejects a normative approach to federal-state disputes based on the values federalism serves. *See id.* at 1349–50.

[580] The Seventeenth Amendment foreclosed representation of the states in Congress, and dependence upon states as units of representation does not guarantee that members of Congress

judicial review will invalidate congressional enactments it views as compromising the integrity of the Constitution's federal structure.[581]

Garcia, *New York*, *Printz*, and *Alden*, as well as *Gregory v. Ashcroft*,[582] all agree that the application of a federal structural test requires the Court to identify the elements of political sovereignty that ensure the states' separate existence.[583] *Printz* makes the principle of dual sovereignty the core of its structural principle.[584] Justice Scalia, writing for the majority in *Printz*, opined that states retain a residual and inviolable sovereignty reflected in the constitutional text.[585] The central inquiry is whether the congressional action compromises the structural framework of dual sovereignty.[586] Attempts to isolate the essence of state sovereignty echo the federalism constraints set in motion by *National League of Cities*, which carved out a protected zone of state immunity based on the preservation of "attributes of state sovereignty."[587] In *Alden*, for example, the

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represent the states' interests. *See* Briffault, *supra* note 522, at 1351.

[581] *See* Briffault, *supra* note 522, at 1351 (finding judicial action appropriate when national actions threaten the federal structure, but acknowledging the difficulty of applying this standard). For Professor Briffault's identification of the federal structure's features, see *supra* note 579.

[582] 501 U.S. 452 (1991).

[583] *See* Alden v. Maine, 119 S. Ct. 2240, 2246–47 (1999) (stating that immunity from suit is a "fundamental aspect" of state sovereignty that is implicit in the Constitution's structure); Printz v. United States, 521 U.S. 898, 917–23 (1997) (stating that the Constitution established a system of dual sovereignty and this separation of powers constitutes one of the Constitution's structural protections of liberty); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806 (1995) (finding that the structure of the Constitution precludes the states from establishing congressional qualifications); New York v. United States, 505 U.S. 144, 177 (1992) (finding take title provisions in a federal law regulating nuclear waste to be inconsistent with the Constitution's federal structure because they infringed upon the core of state sovereignty retained by the states under the Tenth Amendment); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (upholding a state's power to set judicial qualifications as an incident of state sovereignty); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547–48 (1985) (stating that the identification of the elements of political sovereignty deemed essential to the States' existence constitutes one approach to defining the limits upon Congress's Commerce Clause powers).

[584] The Supreme Court stated as follows: "We turn next to consideration of the structure of the Constitution, to see if we can discern among its 'essential postulate[s],' a principle that controls the present cases. It is incontestable that the Constitution established a system of 'dual sovereignty.'" *Printz*, 521 U.S. at 918 (citation omitted). The Court launched into a discussion of dual sovereignty immediately after stating that it was next examining the essential postulates derived from the structure of the Constitution. Therefore, the articulation of the attributes of state sovereignty remain a central task in further applications of the federal structural test. *See id.* at 918–25.

[585] *See id.* at 918–19.

[586] *See id.* The Court examined whether the Brady Act intruded upon state sovereignty.

[587] In *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 287–88 (1981), the Court further elaborated upon its decision in *National League of Cities v. Usery*

dissenting justices sharply disagreed with the Court's characterization of the states' immunity from suit as a "fundamental aspect" of state sovereignty,[588] faulting this conclusion as a natural law "conception."[589]

The *Alden* majority opinion, written by Justice Kennedy, did not elaborate on why the states' sovereign immunity constituted an essential element of the states' residuary sovereignty. Instead, the Court concentrated on process based concerns to support its holding that the Constitution's structure shields the states from Congress's abrogation of their immunity from suit in state courts by private parties to enforce federal law. The Court emphasized that Congress should respect the states' "status as residuary sovereigns and joint participants in the governance of the Nation."[590] It characterized the congressionally triggered private suits against states as coercive commandeering of state governmental processes, pointing to the impact such suits could have upon the states' treasuries and the allocation of state resources.[591] The congressional abrogation of state sovereign immunity was viewed as an intervention in the states' political processes that struck at "the heart of political accountability so essential to our . . . republican form of government."[592]

Because the United States Constitution does not contain textual direction as to how the balance of power between the federal government and the states should be maintained, the Court considers historical understanding, the structure of the Constitution, and prior jurisprudence to determine whether Congress has unconstitutionally invaded a sphere of state autonomy.[593] The federal judiciary enjoys stronger textual support for intruding upon state functions than does Congress. For example, judicial power extends to all cases in law and equity,[594] giving the federal judiciary the power to resolve disputes arising under the Constitution, federal laws, and treaties. The Constitution further directs that the Constitution shall be the supreme law of the land and that the judges in every state shall be bound by it.[595] Unlike Congress, the federal judiciary lacks power,

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by holding that federal commerce power legislation is invalid under the reasoning of *National League of Cities*, if the challenged statute (1) regulates the states as states, (2) addresses matters that are indisputably attributes of state sovereignty, (3) directly impairs the states' ability to structure integral operations in areas of traditional governmental functions, and (4) does not advance a federal interest that necessitates state compliance. The second condition, protection of "attributes of state sovereignty" is similar to the emphasis in *Printz* upon preserving the states' separate and inviolable sovereignty. *See Printz*, 521 U.S. at 918–19.

588 *See Alden*, 119 S. Ct. at 2246–47.

589 *See id.* at 2269–70 (Souter, J., dissenting).

590 *Id.* at 2263.

591 *See id.* at 2263–65.

592 *Id.* at 2265.

593 *See* Printz v. United States, 521 U.S. 898, 905 (1997).

594 U.S. CONST. art. III, § 2, cl.1.

595 *See* U.S. CONST. art. VI, § 2. For a discussion of the Supremacy Clause, see *Alden*,

however, to levy and collect taxes, to preempt state or local laws, or to regulate state and local governments in the manner permitted by Congress's Commerce Clause powers. The Court's remedial powers, on the other hand, frequently command a state or local government to take certain actions that the Court would consider forbidden "commandeering" if undertaken by Congress.[596]

A narrowly constructed structural test protects the states from congressional intervention that impairs their ability to function. Today's most difficult federalism issues are not confined, however, to the survival of the states that is assured even under *Garcia*.[597] Left unanswered is the role, if any, the federal judiciary should play in the proper allocation of power between the states and the national government.[598] Under a structural test, courts will be compelled to decide the point at which a particular federal activity or command bends the structure so far out of shape as to curtail meaningful state participation.[599] This line will be difficult to draw. If drawn narrowly, a federal structural test would preserve the states existence, but would leave the allocation of power to the political processes so long as the states possess the ability to play some role, albeit an insignificant one. A more broadly drawn structural test would require greater judicial involvement in defining and protecting core areas of state responsibility.

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119 S. Ct. at 2254–56, 2266; New York v. United States, 505 U.S. 144, 178–79 (1992). The Court opined that while the Supremacy Clause empowers federal courts "in proper circumstances" to order state compliance with federal law, the clause imparts no authority on Congress to mandate state regulation. *See id.* at 179.

Professor Akhil Reed Amar has emphasized that "[t]he Supremacy Clause does not make federal statutes or federal executive policy supreme; it makes the federal Constitution supreme. . . ." Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 163 (1993). He has argued, however, that "Article III requires that the last word on 'all cases arising under the Constitution of the United States' be vested in the *federal* judiciary." *Id.* at 164 (emphasis in the original). The clause "[a]t a minimum . . . suggests that federal law and the Constitution have become part of the law of the state." Prakash, *supra* note 548, at 2011. State court judges thus have a constitutional duty to enforce the federal constitution and laws. *See id.* at 2012.

[596] *See Printz*, 521 U.S. at 933–35; *New York*, 505 U.S. at 145–46, 175–76; David Schoenbrod & Ross Sandler, *In New York City, the Jails Still Belong to the Judges*, WALL ST. J., Sept. 10, 1997, at A23. Professor Yoo has argued that the Court's upholding of judicial taxation in its 1990 *Jenkins* decision seems inconsistent with *New York*. *See* Yoo, *supra* note 4, at 1134–35.

[597] *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1513 (1994).

[598] *See id.* (expressing the view that because judicial review will assure the states' survival, the goal of protecting the states should focus on exploring the role the states can play in the efficient delivery of services).

[599] Further, it has been argued that the Constitution's structure forbids one governmental branch from engaging in functions outside its defined textual authority. *See* Yoo, *supra* note 4, at 1148.

3. *Argument for Applying the Federal Structural-Framework Test to the Judiciary*

Because the Court believes that the Constitution protects the structural framework of dual sovereignty, it should make such a principle equally applicable to itself as well as to the Congress.[600] The Court's view that judicial review encompasses a duty to protect the Constitution's federal structure must surely extend to all governmental branches powerful enough to disable that structure.[601] The proposition that the judiciary may exercise greater power over the states than the other federal branches of government lacks credibility.[602] The judiciary's imposition of broad, structural remedies to reform state institutions has been labeled inconsistent with the Constitution's structure and beyond the judiciary's inherent powers.[603] More than one commentator believes that antifederalists could argue plausibly for the extension of the Court's *New York* ruling to cover judicial as well as congressional acts that transgress state sovereignty.[604]

The Court in *Alden* highlighted the power that the judiciary exercises in our federalist government. The Court held that "an unlimited congressional power to authorize suits in state court[s] to levy upon the treasuries of the States for compensatory damages" did not comport with the constitutional design.[605] According to the Court, such power denigrates the separate sovereignty of the states.[606] The Court discussed how "the coercive process of judicial tribunals at

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[600] The principle behind the holding in *New York* that the congressionally mandated take title provision violated the Constitution due to its inconsistency with the "federal structure of our Government established by the Constitution," should apply to judicial orders that disable the federal structure. *See* 505 U.S. at 177. In *Printz*, the Court reaffirmed its belief that the states are an essential element of the federal structure in its statement that: "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." 521 U.S. at 928. In *Alden v. Maine*, the Court rejected congressional power to override state sovereign immunity, stating that "the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." 119 S. Ct. 2240, 2255–56 (1999).

[601] As to the judiciary's powers, see *supra* notes 514–17, 530–36 and accompanying text.

[602] *See* Laura S. Fitzgerald, *Beyond* Marbury*: Jurisdictional Self-Dealing in* Seminole Tribe, 52 VAND. L. REV. 407, 409–17, 486–87 (1999) (criticizing the Court's exercise of judicial power to assert subject matter jurisdiction in suits brought by private parties seeking state compliance with federal law while limiting, through its recent Eleventh Amendment jurisprudence, Congress's power to grant such subject matter jurisdiction); *see also* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 670–72 (1978); Yoo, *supra* note 4, at 1165.

[603] *See* Yoo, *supra* note 4, at 1149–50.

[604] *See* Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985, 1004 (1997); Yoo, *supra* note 4, at 1134–35.

[605] *Alden*, 119 S. Ct. at 2264.

[606] *See id.*

the instance of private parties" could subject a state to a "levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf."[607] Finding that private suits for money damages could "threaten the financial integrity of the States," the Court denied Congress's power to authorize such suits because they could pose a "severe and notorious danger to the States and their resources."[608]

Noting that the allocation of scarce resources lies at the heart of the political process, the *Alden* Court cautioned that "suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens."[609] The Court further expressed alarm that disregarding the states' immunity from private suits would subject the states to the "mandates of judicial tribunals" in favor of private interests and erode the states' autonomy and decision-making ability.[610] Although the Court in *Alden* addressed the issue of Congress's power to abrogate state sovereign immunity from suit, each of the policy concerns expressed in *Alden* applies with equal force to the Court's institutional reform remedial measures.[611] The Court's remedial measures in institutional reform litigation both impact upon state and local governmental fiscal resources and representative government.

In *Jenkins*, the Court upheld the power of a district court to act as a state legislature, dictating unauthorized state taxation. The Constitution's structure of enumerated powers and separation of powers among the governmental branches does not support this exercise of remedial power that disrupts existing taxation procedures and functions. Judicial actions that displace or intrude upon a state's core functions certainly distort the Constitution's federal structure.

B. *The Separation of Powers as a Principle of Limitation*

1. *Horizontal and Vertical Separation of Powers*

Because the Framers reasoned that no branch of government could be trusted

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607 *Id.* (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)).

608 *Id.*

609 *Id.*

610 *See id.* at 2264–65.

611 The origin of the plaintiffs' rights constitutes the only difference between the two forms of litigation. In *Alden*, the plaintiffs possessed rights granted by a federal statute whereas in *Jenkins* the plaintiffs possessed rights granted by the Fourteenth Amendment to the Constitution. In *Alden*, the Court made it clear that its holding was not applicable to the protection of Fourteenth Amendment constitutional rights. *See Alden*, 119 S. Ct. at 2267. The Court also pointed out that the sovereign immunity granted states does not extend to a local government or other governmental entity that is not an arm of a state. *See id.* The *Alden* Court objected to Congress's authorization of private suits to enforce a federal statute in lieu of direct federal enforcement activity on the part of the national government. *See id.* at 2269.

to exercise absolute power, they developed a series of complex checks and balances[612] among the branches of government and delegated distinct powers to each branch.[613] The division of powers into legislative, executive, and judicial spheres both promotes efficiency and "precludes the exercise of arbitrary power."[614] The vertical separation of powers crafted by the Framers serves the

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612 *See* W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 109–13 (1965) (distinguishing the separation of powers doctrine from constitutional checks and balances, which is based on the theory that officeholders will seek more power unless checked by other power holders). John Adams embraced the concept of balancing each of the three powers—legislative, executive, and judicial, against the other two powers. *See id.* at 116–17. *See generally* GWYN, *supra*; WOOD, supra note 7, at 151–61 (discussing the origins and development of the separation of powers doctrine).

The colonists included the judicial branch of government into the balance of power arrangement recognizing that the judiciary had a role to play in preserving the governmental balance of power, although doubtful about its strength to withstand legislative attack. *See id.* at 125; *see also* THE FEDERALIST NO. 78, at 464–72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The judiciary's power in this system of checks and balances increased greatly once it assumed the power to review the acts of the other branches for consistency with constitutional law. *See* GWYN, *supra*, at 125; *see also* Anderson, *supra* note 518, at 139–40 (criticizing the Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), for failing to follow the admonition in *The Federalist* to refrain from exercising an "overruling influence over the others in the administration of their respective power") (citing THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961)).

613 *See* BAILYN, *supra* note 373, at 371 (stating that the Constitution's Framers believed that the Constitution's checks and balances would prevent the citizenry's self-interest, greed, and quest for power from destroying the republic created); THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) ("It is agreed on all sides that the powers properly belonging to one of the departments ought not to be . . . administered by either of the other departments."); THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) (arguing that government should be structured for the "separate and distinct exercise of the different powers of government" to preserve liberty); GWYN, *supra* note 612, at 11 (stating that the earliest versions of the separation of powers doctrine maintained that it was a prerequisite for civil liberty); WOOD, *supra* note 7, at 150 (presenting the founders' view that separating power constituted an additional device to ensure the maintenance of liberty in a republican government by distributing power in different people to check each other); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 593 (1986) (arguing that the Framers' notions of the division of powers among the federal branches was based on the concept of balanced government and checks and balances as well as separation of powers with the mistrust of concentrated governmental authority as the underlying premise); Robinson, *supra* note 518, at 48 (stating that the Framers separated federal governmental powers to promote vigorous administration and to prevent tyranny).

614 Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 92 (1995); *see also* William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, *in* SEPARATION OF POWERS—DOES IT STILL WORK? 65, 68–71 (Robert A. Goldwin & Art Kaufman eds., 1986) (presenting early versions of the separation of powers and arguing that the separation of powers framework acts as an

same goals as the horizontal distribution of power.[615] Dividing governmental powers among the states and the national government further promotes liberty and curbs tyranny.[616] The Court's reliance in *Alden*, *Printz*, and *New York* upon federal structural principles signifies a new shift in the post-New Deal era toward placing greater emphasis upon the vertical separation of powers.

The federal judiciary creates tensions in both the vertical and the horizontal separation of powers when it orders state and local governments to undertake large-scale remedial programs. Institutional litigation affects the vertical separation of powers through its use of federal judicial power to reconstitute state and local institutions and programs to meet constitutional requirements. When the federal judiciary's supervision of the equitable remedial process causes it to perform duties of a nonjudicial nature at the state and local governmental levels, the Constitution's division of horizontal powers is upset.[617]

In *Jenkins*, the lower court's detailed oversight of the remedial process involved the use of executive and administrative power. The district court specified, for example, the number of certified librarians the KCMSD should hire and the number of minutes each day that teachers should devote to planning and instruction.[618] The district court's fiscal and taxation orders reallocated local and state fiscal resources, a legislative function.[619] When the judiciary performs powers delegated to the other governmental branches, it acts without textual support and contrary to the Constitution's structure of separated power. Further, it prevents democratic processes from operating.[620]

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auxiliary safeguard to achieve liberty with primary dependence upon the people to control government). Hamilton and Madison expressed the view that the separation of powers doctrine required that the three powers of government be exercised by different office holders, but they also stressed the need for each branch to exercise some of the powers granted to the other branches in order to check encroachments on it from the other branches. *See id.* at 74.

615 *See* Sullivan, *supra* note 614, at 95 (finding that both the division of power within the federal government and the division of power between the states and the federal government preserve liberty and prevent tyranny).

616 *See* New York v. United States, 505 U.S. 144, 181 (1992); THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); Amar, *supra* note 373, at 1450.

617 *See* Yoo, *supra* note 4, at 1140–41 (criticizing the federal judiciary's performance of executive and legislative functions in the supervision of judicially mandated state institutional reforms as circumventing democratic processes).

618 *See* Jenkins v. Missouri, 639 F. Supp. 19, 26 (W.D. Mo. 1985).

619 *See id.* at 45 (overturning Missouri state law to enjoin a tax levy rollback for the purpose of raising $4,000,000 to implement the court-ordered desegregation plan).

620 *See* Yoo, *supra* note 4, at 1149 (noting that "when the Constitution removes certain decisions from the democratic processes of the states, it does so explicitly in the Constitution's text").

2. Elrod v. Burns—*Nonapplicability of the Separation of Powers Doctrine to the "Federal Judiciary's Relationship to the States"*

In *Elrod v. Burns*,[621] the Court, in a plurality opinion, maintained that separation of powers principles do not apply to the federal judiciary's relationship to the states.[622] *Elrod* invalidated a Cook County Sheriff's discharge of noncivil-service employees on the basis of their political affiliation. Justice Brennan, writing for the plurality, opined that the political question doctrine and the principle of separation of powers had no applicability to the "'federal judiciary's relationship to the States,'" but applied only to the relationship of the judiciary to the other coordinate branches of the national government.[623] He argued that no judicial impairment of state executive power could exist when the exercise of that state power was impermissible under the Constitution.[624] The plurality viewed the question presented in *Elrod* as involving only a question of constitutional interpretation, which was within the province of the Court.[625]

Elrod pertained to the use of state executive power ultimately found unconstitutional.[626] When the Court orders state and local governments to undertake extensive remedial actions, it is the equitable remedies, not the underlying unconstitutional actions, that result in the judicial performance of legislative and executive functions. Justice Brennan's argument that the removal of an unconstitutional condition necessitates judicial interference irrespective of vertical separation of powers considerations does not necessarily extend to the judiciary's remedial course of action. The Court may choose from a broad range of equitable remedies, some of which may avoid vertical and horizontal separation of powers issues. Further, the reasoning of the Court's 1999 opinion in *Alden* casts doubt upon the *Elrod* plurality position that the judiciary may act without regard to any limitations imposed by the vertical separation of powers. The *Alden* Court objected to the displacement of state governmental processes and the reallocation of scarce resources resulting from Congress's removal of

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621 427 U.S. 347 (1976).

622 *See* Elrod v. Burns, 427 U.S. 347, 352 (1976); *see also* Nagel, *supra* note 602, at 665–67 (disagreeing with the conclusion in *Elrod v. Burns* that the separation of powers does not apply to the relationship between the federal judiciary and the states).

623 *See Elrod*, 427 U.S. at 351 (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)); *see also* MCGOWAN, *supra* note 85, at 39 (stating that Justice Brennan did not view the Supremacy Clause as minimizing the importance of state courts or as solely defining the legal relationship between federal and state courts).

624 *See Elrod*, 427 U.S. at 352.

625 *See id.* In a dissenting opinion, Justice Powell wrote that local legislative determinations regarding patronage hiring practices should receive as much weight as the Court accords to congressional legislation that increases political discourse, but adversely affects some First Amendment interests. *See id.* at 386 n.9 (Powell, J., dissenting).

626 *See id.* at 372–73.

state sovereign immunity to facilitate federal law enforcement in state courts by private parties seeking compensatory damages.[627]

Typically, the Court relies upon the Supremacy Clause as the justification for its command of remedial actions that disturb state autonomy.[628] The assumption that the Supremacy Clause is inconsistent with applying vertical separation of powers limitations upon the judiciary has been termed incorrect.[629] This clause only provides that the Constitution, federal laws, and treaties "shall be the supreme Law of the Land."[630] The clause does not address specifically the imposition of equitable remedies that violate the Framers understanding of separated powers while attempting to remove state and local constitutional violations.[631]

When federal law supremacy values clash with separation of powers values, the possibility of at least three different outcomes exists. One option presented by the plurality opinion in *Elrod* posits that vertical separation of power constraints are inapplicable to the federal judiciary. Conversely, as a second option, one can argue that the federal judiciary lacks authority to exercise powers not contemplated by the Constitution's federal design even if constitutional violations remain incompletely redressed.[632] The Court's opinions in *Alden* and *Printz* support this position.[633] Because Article III vests the judiciary only with judicial power, the separation of powers doctrine prevents it from exercising nonjudicial power not delegated to it.[634]

The application of a balancing test constitutes a third option. Separation of

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[627] *See* Alden v. Maine, 119 S. Ct. 2240, 2264–65 (1999).

[628] *See supra* note 373 and accompanying text. The Supremacy Clause has been described as the Constitution's most explicit and significant statement concerning federalism. *See* Chemerinsky, *supra* note 537, at 975.

[629] *See* Nagel, *supra* note 602, at 667.

[630] U.S. CONST. art. VI, § 2.

[631] This dilemma has been described as the "tension . . . between the possibility that a clearly subordinate state policy might infringe a federal constitutional right, and the possibility that the method of protecting that right might itself violate the Constitution." *See* Nagel, *supra* note 602, at 678. Professor Nagel concludes that "[t]he proper resolution of this dilemma cannot be to abandon the constitutional decision-making structure." *Id.*

[632] *See* Nagel, *supra* note 602, at 678–81.

[633] *See* Alden v. Maine, 119 S. Ct. 2240, 2255 (1999) (stating that only federal law in accord with the constitutional design qualifies as binding upon the states pursuant to the Supremacy Clause); Printz v. United States, 521 U.S. 898, 924–25 (1997) (finding that laws that violate state sovereignty are not in accord with the Constitution, rendering them unenforceable under the Supremacy Clause). Justice Souter in his dissenting opinion in *Alden* criticized the Court for abandoning the principle that the existence of a right assures a remedy. *See Alden*, 119 S. Ct. at 2295 (Souter, J., dissenting).

[634] Professor Nagel has argued that the Framers intended to protect states from separation of powers violations at the hands of the federal governmental branches through the Tenth Amendment. *See* Nagel, *supra* note 602, at 667–68.

powers values protecting the states' integrity in a federal structure can be weighed against the value of fully remedying all constitutional violations irrespective of the corrective action's effect upon the Constitution's federal structure. It remains unclear how the Court would determine which of the competing values bears the strongest weight in a particular case. In *Printz*, Justice Scalia, writing for the Court, rejected the use of balancing analysis to determine whether a congressional enactment compromised the federal structural framework.[635] He viewed laws that upset the "structural framework of dual sovereignty" as unconstitutional.[636]

3. *Formalistic and Functional Approaches to the Separation of Powers Doctrine*

Supreme Court decisions defining the parameters of the separation of powers doctrine oscillate between a formalistic and a functional approach.[637] Under a

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[635] Justice Scalia opined that the Supremacy Clause applies only to laws in accord with the Constitution. *See Printz*, 521 U.S. at 924–25. Thus, if the remedial action violated the Constitution's federal structure, it would be unconstitutional and bereft of Supremacy Clause protection. *See* Jackson, *supra* note 94, at 2194 (noting that *Printz* applied a categorical principle barring Congress from enlisting state officers to administer a federal regulatory program, thereby rejecting an approach marked by balancing the states' temporary enforcement burden against the importance of the federal interest).

[636] *Printz*, 521 U.S. at 932. The Court took a similar position in *Alden v. Maine*, 119 S. Ct. at 2255–56. The Court stated that "the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." *Id.*; *see also* Jackson, *supra* note 94, at 2195–97 (criticizing the theory of dual sovereignty as inconsistent with the Court's constitutional jurisprudence and contrary to the federal government's supremacy when acting within its sphere of authority).

[637] *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (finding that the Supreme Court has vacillated between perceived necessity of maintaining three distinct branches of government and a flexible approach that stresses core function and relationship); Sullivan, *supra* note 614, at 91–92 (pointing out that structural analysis involving the relationship between the federal government and states parallels the horizontal separation of powers in oscillating between a formal and functional mode).

Recently, the Court took a functional approach in *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the creation of independent counsel to investigate and prosecute executive branch officials) and in *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding sentencing commission, comprised in part of federal judges, to draft sentencing guidelines). The Court's formalism approach is seen in *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (finding that states lack power to fix restrictions upon congressional qualifications); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating the Gramm-Rudman-Hollings Act); INS v. Chadha, 462 U.S. 919 (1983) (invalidating the legislative veto); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (invalidating Congress's grant of power to bankruptcy judges to exercise jurisdiction over all matters arising under the bankruptcy laws as an infringement upon the powers of Article III courts).

formalistic approach, the Court prohibits one branch from assuming functions assigned to another branch irrespective of whether the incursion promotes efficiency or fulfills a sound governmental need.[638] Formalism fosters a literal reading of the Constitution.[639] When the Court takes a functionalist posture, it refuses, however, to invalidate one branch's assumption of functions outside its literal parameters—unless the power exercised unduly impairs another branch's ability to function.[640] Less emphasis is placed upon rigidly keeping the powers of each branch separate and distinct so long as governmental accountability and practical efficiency are maintained.[641]

Supreme Court rulings on the Constitution's vertical division of powers between Congress and the states embrace both formalism and functionalism.[642] Formalism is demonstrated when the Court preserves a zone of protected state sovereignty and refuses to examine the degree of federal intrusiveness caused by the contested federal legislation. When the Court examines the effect of the federal encroachment upon the states' ability to function in a federal system, it takes a functionalist approach, often characterized by the use of a balancing test to weigh both federal and state interests.

Commentators have argued that *National League of Cities v. Usery* supports both formalistic and functional platforms. The decision's protection of "traditional" and "integral" state functions from congressional invasion, later overruled in *Garcia*, upheld formalism values.[643] The Court's willingness, on the other hand, in *National League* to examine both federal and state interests has

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638 *See* Sullivan, *supra* note 614, at 92 (concluding that the formal approach presumes that trespass by one branch into another's functions is unconstitutional irrespective of whether the trespass threatens the functionality of the other branch or concentrates excessive power in a branch).

639 *See* Suzanna Sherry, *Separation of Powers: Asking a Different Question*, 30 WM. & MARY L. REV. 287, 289 (1989) (stating that formalism, as the modern approach to separation of powers questions, views the Constitution's literal language itself as authoritative).

640 *See* Sullivan, *supra* note 614, at 93 (stating that the functional approach is pragmatic and rests on a theory of balancing powers rather than upon a strict separation of powers).

641 *See id.* at 106 (stating that "[a] functional approach defers to the political resolution of structural controversies, unless some political-process defect is apparent").

642 *See* George D. Brown, *Article III as a Fundamental Value—The Demise of* Northern Pipeline *and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55, 78 (1988) (characterizing the period from 1976 to 1988 as one in which "the Court moved away from the apparent formalism of its original decision [*National League of Cities*], which rested in part on notions of zones of state autonomy, to a pragmatic approach balancing state and national interests").

643 *See* Brown, *supra* note 642, at 78 (seeing formalism in *National League of Cities*' reliance "in part on notions of zones of state autonomy"); Sullivan, *supra* note 614, at 95 (arguing that *National League of Cities* comes closest to formalism in the modern vertical separation of powers context).

come to symbolize the Court's use of a balancing test, a functionalist tool.[644]

The Court returned to a more formalistic mode, in *New York v. United States* and in *Printz v. United States*, finding that the practical efficiency of the federal legislation invalidated in both cases did not suffice against Tenth Amendment challenges.[645] In *U.S. Term Limits, Inc. v. Thornton*,[646] the Court upheld, however, federal power against state encroachments, ruling that state term-limits laws barring certain congressional incumbents from re-election were unconstitutional.[647] The above decisions relate only to clashes between Congress and the states. They offer little guidance as to whether the Court, if challenged, would apply vertical separation of powers values to itself or how it would apply them. In *Mistretta v. United States*[648] the Court, in a functionalist posture, upheld the constitutionality of service by federal judges on the United States Sentencing Commission, opining that Congress may delegate some non-Article III functions to Article III judges.[649] The Court takes a functionalist stance in institutional reform litigation, as in *Jenkins*, assuming powers vested in state and local legislators and officials to expedite the remedial process.

4. *Argument for Applying the Separation of Powers Doctrine to the Judiciary*

Removing the judiciary's enforcement powers from separation of powers restraints, while subjecting the executive and legislative branches, to such limitations results in a lack of constitutional coherency and violates the Framer's belief that these structural limitations should apply to all federal branches.[650]

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644 *See* Caminker, *supra* note 557, at 247 (contrasting the formalist approach in *Printz* with the "*National League of Cities* balancing test").

645 In *Printz v. United States*, 521 U.S. 898, 932 (1995), the Court rejected a pragmatic balancing approach as inappropriate in which the federal legislation "compromise[d] the structural framework of dual sovereignty." *See also* Caminker, *supra* note 557, at 245.

646 514 U.S. 779 (1995).

647 *See* Sullivan, *supra* note 614, at 103 (finding that the majority in *U.S. Term Limits* supported the more traditional view that the role of the Court lies in defending federal power). After comparing the votes of the United States Supreme Court justices in *U.S. Term Limits* and *Lopez*, Professor Sullivan concluded that four justices will strike down a state encroachment upon the federal government, but not a federal intrusion upon the states whereas an equal number of justices will do the opposite—strike down a federal encroachment upon the states, but not a state intrusion upon the federal government. *See* Sullivan, *supra* note 614, at 103. Only Justice Kennedy, who took the majority view in both *U.S. Term Limits* and *Lopez*, views federalism as holding both the states and federal government within the bounds of their spheres of authority. *See id.*

648 488 U.S. 361 (1989).

649 *See id.* at 665–68, 671–74, 676.

650 *See* Nagel, *supra* note 602, at 663 (citing THE FEDERALIST NO. 47, at 326 (James Madison) (J. Cooke ed., 1961)); *see also* Anderson, *supra* note 518, at 138, 140 (arguing that

Structural limitations inherent in the Constitution's separation of powers among the federal branches limit the scope of federal judicial remedial processes to some degree.[651] The Court should acknowledge that functional limitations upon the judiciary's authority do exist. Accordingly, the Court should not uphold the enforcement of remedies that cause it to assume executive and legislative functions at the state and local levels of government.[652] Clearly, the judiciary can invalidate an unconstitutional state tax. But the creation of taxation and the modification of a legally binding state tax to remedy constitutional violations, as in *Jenkins*, thrusts the judiciary into a legislative role for which it lacks experience or legitimacy under the separation of powers doctrine.[653] The Constitution's division of power into judicial, legislative, and executive spheres does not support the federal judiciary's assumption of non-Article III powers.[654]

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the Court should be bound by the separation of powers doctrine and that the majority opinion in *INS v. Chadha* indicates a view that the Court is exempt from such doctrine).

[651] *See* Anderson, *supra* note 518, at 138, 141 (arguing that the separation of powers is a structural device designed to remedy the defects of democratic government with the expectation that the other branches will check the power of a branch that abuses its power); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514 (1991) (arguing that the Constitution's separation of powers should not be treated as an isolated area of the law, but rather should be seen as a vital part of the Constitution's structure); Kurland, *supra* note 613, at 602 (arguing that the separation of powers is a construct on which a constitution was framed rather than a rule of decision).

Professor Yoo argues that the federal courts lack inherent authority to undertake the structural remedial reform of state institutions because the exercise of such equitable remedies are inconsistent with the Constitution's text, the Constitution's structure of federalism and separation of powers, and the original understanding of the Constitution. *See* Yoo, *supra* note 4, at 1140–42, 1149–51, 1166.

[652] *See* Anderson, *supra* note 518, at 138, 139 (pointing out the irony in the Court's guardianship of separation of powers through judicial review when it has been the branch most guilty of violating the doctrine); Kurland, *supra* note 613, at 593 (1986) (arguing that separation of powers encompasses the notion that the fundamental differences in governmental functions, whether legislative, executive, or judicial, must be maintained as separate and distinct). *But see* DAHL, *supra* note 515, at 197 (arguing that the legitimacy of judicial review that negates federal rather than state and local legislation can be challenged more readily because overturning the preferences of national majorities is more problematic than negating the laws of a minority of the citizenry).

[653] Professor Neil Kinkopf has argued that Congress is bound by an antiaggrandizement principle, as well as the general separation of powers principle, that prohibits the Congress from "aggrandiz[ing] itself by claiming power beyond its constitutionally assigned sphere." Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-federal Actors*, 50 RUTGERS L.J. 331, 345 (1998). An antiaggrandizement principle applies to the allocation of power among the three federal branches. *See id.* at 347. It thus forbids the judiciary from exercising taxation, a legislative power. *Bowsher v. Synar* and its progeny clearly confirm the existence of an antiaggrandizement principle. *See id.* at 345–47.

[654] *See* Yoo, *supra* note 4, at 1123–24, 1140–42, 1144–48, 1150.

C. *Comity and Federalism as Principles of Limitation*

Comity may be described as the practice of treating another equal jurisdiction or nation with courtesy and good will. It rests upon a moral rather than a legal duty.[655] In the international arena, comity principles impose an obligation upon nations to give effect to foreign laws when appropriate.[656] Similarly, comity underlies choice of law principles when the law of one state is applied to a case in another state.[657] Comity principles also apply to federal-state relations dictating proper respect in the division of federal and state judicial functions.[658]

Notions of comity support the federal judiciary's longstanding policy of restraint from interference with state court proceedings.[659] For example, in *Younger v. Harris*,[660] the Court confirmed that equity, comity, and federalism considerations restrain federal courts from granting injunctive relief against state criminal prosecutions absent extraordinary conditions.[661] Under the abstention doctrine, federal courts may abstain from exercising jurisdiction in cases in which a federal constitutional question cannot be resolved without clarifying unsettled state law.[662] The underlying policy is that federal courts should not take

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655 *See* Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years Later*, 48 HARV. L. REV. 15, 35 (1934).

656 *See* Holly Sprague, Comment, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CAL. L. REV. 1447, 1448–50 (1986); *see also* Lorenzen, *supra* note 655, at 19–29, 34–38 (describing Justice Story's introduction of comity principles in Anglo-American law to resolve choice of law issues).

657 *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAW 33–37, 232 (Arno Press 1972) (1834).

658 *See* Younger v. Harris, 401 U.S. 37, 44 (1971); *see also* Alden v. Maine, 119 S. Ct. 2240, 2268 (1999) (stating that when Congress legislates in matters affecting the states, it "must respect the sovereignty of the States"); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 119 (1981) (Brennan, J., concurring) (stating that "the 'principle of comity' refers to the 'proper respect for state functions' that organs of the National Government, most particularly the federal courts, are expected to demonstrate in the exercise of their own legitimate powers").

659 *See Younger*, 401 U.S. at 43–44; *see also* O'Shea v. Littleton, 414 U.S. 488, 501–02 (1974) (barring federal injunctive relief against state officials engaged in the administration of state criminal laws because relief sought would cause continuous supervision over state court proceedings contrary to the principles of comity); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943) (withholding declaratory relief to employers seeking to enjoin the enforcement of Louisiana's state unemployment law because public policy grounds dictate against federal judicial interference with a state's domestic policy).

660 401 U.S. 37 (1971).

661 *See Younger*, 401 U.S. at 43–45.

662 *See* Harris County Comm'rs Court v. Moore, 420 U.S. 77, 87 (1975) (holding that abstention is appropriate in an action contesting the constitutionality of justice of peace precinct redistricting because unsettled state law precluded the resolution of constitutional issues raised by displaced justices of the peace and constables); Railroad Comm'n v. Pullman Co., 312 U.S.

jurisdiction of a case until state courts have the opportunity to decide the underlying state law questions.[663]

The Court consistently considers comity restraints when it contemplates exercising intrusive forms of equitable power.[664] Premised upon the belief that the federal judiciary must show proper respect for the integrity and proper functioning of local governments when exercising equitable powers, the Court endorses the use of minimally intrusive methods to remedy constitutional violations.[665] This so-called "overly intrusive" principle of limitation causes the federal judiciary to show sensitivity toward state autonomy in such diverse areas as local school funding,[666] remedial funding orders,[667] and prison administration,[668] as well as state taxation matters.[669]

Federal courts, citing federalism and comity concerns, are particularly deferential in matters involving state tax systems.[670] In *Fair Assessment in Real*

496, 499–500 (1941) (applying abstention in action contesting an order of the Railroad Commission of Texas because the Supreme Court of Texas rather than the district court should decide whether the Commission acted within its scope of authority); *see also* MCGOWAN, *supra* note 85, at 64–71 (discussing the historic development of the concept of abstention and giving the author's view of its status).

663 *See Harris County*, 420 U.S. at 87–89.

664 *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 119–20 (Brennan, J., concurring).

665 *See* Missouri v. Jenkins, 495 U.S. 33, 51 (1990).

666 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58–59 (1973) (finding that Texas's plan for financing public education did not violate the Equal Protection Clause and opining that fundamental reforms with respect to state education and taxation must come from state lawmakers); West Virginia Educ. Ass'n v. Legislature of West Virginia, 369 S.E.2d 454, 454 (W. Va. 1988) (deferring a writ of mandamus on grounds of comity so the Governor and state legislature could remedy unconstitutional cuts in state expenditures for education); *see also infra* note 726 and accompanying text.

667 *See* Bradley v. Baliles, 639 F. Supp. 680, 689–90 (E.D. Va. 1986) (denying a request for additional state funding in school desegregation action because unless the funding remedies the effects of past state-imposed school segregation, the court lacks authority to order it). In *Bradley*, the court, citing *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983), opined that it should exercise restraint from using its broad equitable powers to upgrade an educational system in ways not related to the desegregation remedial process. *See Bradley*, 639 F. Supp. at 690.

668 *See supra* notes 453–61 and accompanying text.

669 *See* Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review, 642 A.2d 1251, 1263–64 (Del. Super. Ct. 1993) (holding that the intrusive nature of challenges to state tax administration under 42 U.S.C. § 1983 bar this form of action if state remedies afford taxpayers an opportunity for relief).

670 *See* National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 590–92 (1995) (barring injunctive relief under Section 1983 action brought by nonresident motor carriers who challenged state taxes as unconstitutional); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 300–02 (1943) (holding that federal courts are barred from rendering declaratory judgments as to the constitutionality of state tax laws); *In re* Gillis, 836 F.2d 1001,

Estate Association v. McNary,[671] the Court held that comity principles barred state tax payers from suing in federal court under civil rights legislation to redress the alleged unconstitutional administration of Missouri's tax system.[672] The Court reasoned that comity principles applied because the intrusive nature of federal court interference with state tax enforcement disrupted the state's revenue collection system and interfered with the "rightful independence of state governments."[673]

Both the majority and the concurring opinions in *Missouri v. Jenkins* recognized the role comity and federalism play in limiting judicial interference in sensitive state-federal relations. The Court ruled that principles of federal-state comity prohibited the federal judiciary from directly imposing remedial property taxation.[674] Justice White, writing for the majority, opined, however, that the district court could order the school district to impose such taxation as well as enjoin the operation of state law that hindered such local taxation.[675] Justice Kennedy, in his concurring opinion, disagreed with this posture, finding no distinction between the direct imposition of a tax by the judiciary and an order directing the school district to impose the tax.[676]

The application of comity principles has been criticized as indeterminate and overly broad.[677] Typically the Court rules that one area of federal-state relations, such as the administration of a state's tax system, must be treated with respect and concern. Thus, until the Court so rules, the applicability of the doctrine remains uncertain. In *Jenkins*, the Court had the opportunity to extend the comity principle applied in the *McNary* case to cover judicially ordered taxation as well as judicial interference with a state's tax administration. The Court chose not to do so, but it may be persuaded otherwise in the future.[678]

1005–09 (6th Cir. 1988) (upholding on comity principles a district court's refusal to hear a claim alleging that Kentucky's property tax assessment policies relating to coal, oil, and gas property interests violated equal protection principles).

671 454 U.S. 100 (1981).

672 *See id.* at 107 (holding that comity bars federal courts from granting injunctive and declaratory relief in challenges to state tax systems); *see also Great Lakes*, 319 U.S. at 300–01 (holding that federal courts are restrained by equitable principles from rendering declaratory judgments as to the constitutionality of state tax laws).

673 *McNary*, 454 U.S. at 113–16.

674 *See* Missouri v. Jenkins, 495 U.S. 33, 50 (1990).

675 *See id.* at 50–51.

676 *See id.* at 63–64.

677 *See* Sprague, *supra* note 656, at 1452; *see also* Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 94 (1991) (viewing comity as an abstraction).

678 In *Missouri v. Jenkins*, Justice Thomas, in a concurring opinion, for example, criticized the Court's broadened exercise of equitable power through the use of structural injunctions in school desegregation and other institutional litigations. *See* 515 U.S. 70, 126 (1995). He stated that "[s]uch extravagant uses of judicial power are at odds with the history and tradition of the equity power and the Framers' design." *Id.* Justice Thomas expressed disapproval of the

In *McNary*, the Court stressed the importance of a state's ability to administer its fiscal affairs without federal interference.[679] It equated a state's ability to collect revenues as essential to its independence.[680] The federal judiciary should show the same respect for essential state functions when it orders state and local structural reforms. In *Jenkins*, the district court proceeded with a remedial course of action that disrupted the state's taxation procedures, overruled state taxation limits, and reallocated sizable state resources. Surely this course of action violated comity principles as the Court has articulated them. *Jenkins* cannot be reconciled with *McNary*. The magnitude of the intrusion in both cases is comparable.[681]

D. *The Guarantee Clause as a Principle of Limitation*

1. *Background*

The Constitution's Guarantee Clause provides that the United States shall guarantee to each of its states a republican form of government.[682] The clause's two distinct facets are the following: (1) it prohibits the states from adopting any form of government other than a republican one; and (2) it obligates the federal government to ensure that the states enjoy a republican form of government.[683] Traditionally, the Court has refused to exercise judicial review over lawsuits brought against a state asserting the state's failure to meet its obligation to maintain a republican form of government.[684] The Court has viewed these Guarantee Clause challenges as nonjusticiable because they present political

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Court's finding in its 1990 *Jenkins* decision that a district court possesses the power to order a local governmental body to levy taxes and implied that this ruling could violate the principles of comity. *See id.*

[679] *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 110 (1981).

[680] *See id.* at 108–09.

[681] *See infra* notes 764–65 and accompanying text.

[682] *See* U.S. CONST. art. IV, § 4. For a discussion of the Framers' view of republican government, see ELY, *supra* note 14, at 77–78; WOOD, *supra* note 7, at 47–75, 150; Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 515–30 (1962).

[683] *See* Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 815 (1994). For a detailed discussion of the Framers' reasons for adopting the Guarantee Clause, see Bonfield, *supra* note 682, at 517–22. The clause was deemed essential to ensure that all of the states possessed the same kind of government—a republican one. *See id.* at 518.

[684] *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Bonfield, *supra* note 682, at 554–57. Daniel J. Elazar, a noted scholar on federalism, writes: "While the political process has been put to hard use to find ways to guarantee state political integrity against the pressures of centralization, virtually nothing has been added to the constitutional guarantees that allow federal authority to be used to maintain representative government within the states." ELAZAR, *supra* note 513, at 191.

questions.[685] The Court presented strong policy reasons for this stand in *Pacific States Telephone & Telegraph Co. v. Oregon*.[686]

The defendant taxpayer in *Pacific States* asserted that the enactment of an Oregon law through the use of an initiative measure violated the Guarantee Clause. The Court stated that should it extend judicial review to plaintiffs invoking the clause to invalidate state action, citizens frequently would contest in court proceedings any one of the innumerable state obligations placed upon them.[687] The Court reasoned that in the course of such litigation the judiciary could absolve citizens of their duties to their state government, thereby weakening legislative authority and blurring the distinction between the judiciary and legislative branches.[688] The Court concluded that making the clause justiciable would amount to the assumption of judicial authority over a political matter that should lie within the authority of the legislative branch.[689]

Other traditional reasons for making the Guarantee Clause nonjusticiable

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[685] *See* Bonfield, *supra* note 682, at 534–36, 553–54, 556–57. The Court has treated some issues arising under the Guarantee Clause as justiciable. These areas most notably include congressional acts that interfere with state autonomy. *See* Coyle v. Oklahoma, 221 U.S. 559, 574 (1911); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 920–21, 945 (1994).

[686] 223 U.S. 118 (1912). For a discussion of *Pacific States Telephone & Telegraph Co. v. Oregon*, see Bonfield, *supra* note 682, at 553–57.

[687] *See Pacific States*, 223 U.S. at 141–42.

[688] *See id.* at 142. The Court stated:

> [D]o the provisions of that Article [the Guarantee Clause] obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured,–a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation.

Id.

[689] *See id.* at 142. The *Pacific States* Court opined that Guarantee Clause judicial review of state action would lead to the "ruinous destruction of legislative authority in matters purely political." *Id.* at 141. Should the Guarantee Clause become fully justiciable, it could place the Court, as in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), in the position of sanctioning which of two, or perhaps more, competing state governments was legitimate. Such a course of action would preempt legislative action at the state level and perhaps at the federal level should Congress disagree with the Court's view. *See Pacific States*, 223 U.S. at 141–42. The Court concluded that *Luther*, which established the rule of treating the Guarantee Clause as nonjusticiable, remained the leading and controlling decision. *See id.* at 143. One scholar believes that the Court in *Pacific States* was concerned about the possible invalidation of a substantial body of state law if the enactments were shown to have been enacted in a nonrepublican manner. *See* Bonfield, *supra* note 682, at 555.

stem from the general language of the clause and its failure to define a republican form of government.[690] Recent scholarship expressing the need to give judicial content and meaning to the clause appears to have been heard.[691] In the 1990s, the Court opened a crack in the door of its nonjusticiable rulings under the Guarantee Clause when it entertained the notion that the doctrine does not bar the Court from reviewing congressional actions alleged to undermine a state's republican form of government. For example, in *Gregory v. Ashcroft*, Justice O'Connor opined that the ability of a state to determine the qualifications of its officers constituted a core feature of representative government guaranteed by the Guarantee Clause.[692] One year later, in *New York v. United States*, the Court, with Justice O'Connor again writing the opinion, held that the Guarantee Clause was not violated by amendments to the Low-Level Radioactive Waste Policy Amendments Act that encouraged the states to develop nuclear waste disposal sites by providing monetary incentives and denying site access for failure to meet the Act's deadlines.[693]

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[690] *See* Weinberg, *supra* note 685, at 945. The Court in *Baker v. Carr*, 369 U.S. 186 (1962), concluded that the lack of criteria by which to judge Guarantee Clause issues was one factor in the Court's decision in *Luther v. Borden* to make the clause nonjusticiable. *See id.* at 222. The Court in *Baker* opined that *Luther* held that the Guarantee Clause lacks judicially manageable standards. *See id.* at 223. For a discussion of *Luther v. Borden*, see Bonfield, *supra* note 682, at 533–36.

[691] *See, e.g.*, Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749–54 (1994) (arguing that the central meaning of republican government is popular sovereignty and that the Guarantee Clause should be justiciable); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 850, 871, 878 (1994) (arguing that the judiciary has a role in enforcing the Guarantee Clause); Merritt, *The Guarantee Clause*, *supra* note 522, at 70–78 (supporting the justiciability of the Guarantee Clause). *But see* Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835, 836–42 (1994) (arguing that the Guarantee Clause does not preserve states' autonomy over voting rights regulation); Robert F. Nagel, *Terminator 2*, 65 U. COLO. L. REV. 843, 846–47 (1994) (arguing that a single law will not cause a state to lose its republican character and that the clause has a narrow focus, being included in the Constitution to prevent monarchial governments and to protect the states from unlawful insurrections).

[692] *See* 501 U.S. 452, 463 (1991). The Court's opinion additionally noted, however, that a state's authority to determine qualifications for its governmental officials was constrained by "[o]ther constitutional provisions, most notably the Fourteenth Amendment." *Id.*

[693] *See* New York v. United States, 505 U.S. 144, 185–86 (1992). The Court reasoned that because the states were free to choose, rather than commanded to comply with these incentives provisions, the states remained accountable to their electorates and "retain[ed] the ability to set their legislative agendas." *Id.*

2. *Recent Scholarship in Support of Making the Guarantee Clause Justiciable*

Scholars have offered a number of arguments as to why the Guarantee Clause should be justiciable. These views are presented below.

a. *Textual Support for Justiciability*

The text of the Guarantee Clause states that the "United States" shall guarantee to the states a republican form of government.[694] This generic term would seem to include the Court as well as Congress and the President.[695] If the clause is nonjusticiable, however, only the Congress and the President would possess power to enforce it. Scholars argue that the location of the clause in Article IV of the Constitution supports the notion that the clause is applicable to all three branches; otherwise, it would have been placed in the specific article empowering each branch.[696] Because Article IV contains provisions relating to the states, the placement of the Guarantee Clause in it may reflect, however, only a judgment by the Framers that the clause naturally belongs there.

b. *Judiciary's Role as Protectorate of the Constitution*

Commentators argue that among the three branches the judiciary possesses the best capability for enforcing the Guarantee Clause's dictates.[697] Because the judiciary interprets the Constitution, it should not abdicate all responsibility for enforcement of the clause, but should forego judicial review only in those instances where the other branches serve as better enforcement agencies.[698] Should the clause remain largely nonjusticiable, its relevancy will remain uncertain because the executive and legislative branches, while generally responsive to political pressures, may decline to enforce it; in contrast, the

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694 *See* U.S. CONST. art. IV, § 4.

695 Justices Black and Harlan have considered the clause to be applicable to a federal district court judge. *See, e.g.*, Lance v. Plummer, 384 U.S. 929, 931–32 (1966) (Black, J., dissenting). It has been argued that the use of "United States" in the Guarantee Clause intimates that the clause's duty rests upon all three branches of the federal government in their appropriate spheres. *See* Bonfield, *supra* note 682, at 523; Chemerinsky, *supra* note 691, at 871.

696 *See* Bonfield, *supra* note 682, at 523 (arguing that the judiciary is as fully empowered to enforce the clause as Congress because the clause was placed in a separate article, rather than in articles I, II, or III relating to the duties of a specific branch of government); Merritt, *supra* note 522, at 75 (arguing that the location of the Guarantee Clause in Article IV, rather than in the articles covering a specific branch of the federal government, indicates the clause applies to all three branches).

697 *See* Chemerinsky, *supra* note 691, at 852, 875–78.

698 *See id.* at 851–53; *see also* Weinberg, *supra* note 685, at 889, 913.

judiciary must decide justiciable claims.[699]

c. *Anomaly of Only Two Branch Enforcement of the Guarantee Clause*

It would be anomalous for the judiciary to escape a duty to uphold the principle that the United States shall guarantee a republican form of government to each state.[700] All three branches must effectuate the policy expressed in the clause to make its provisions effective. Exempting the judiciary from enforcement of the Guarantee Clause makes the clause unduly weak and may diminish the willingness of the executive and legislative branches to enforce it.

d. *Indeterminacy Argument Lacks Merit*

The Guarantee Clause's general wording and its failure to define what constitutes a republican form of government should not foreclose the judiciary from reviewing alleged breaches of the clause. The definitive features of a republican government remain ascertainable. Such a form of government has been defined as one that derives its powers from the people[701] who are empowered to alter their government, to choose their own form of government, and to elect officers as well as determine qualifications to hold office.[702] Representation, in which a small group of citizens elected by the rest govern, constitutes the defining feature of American republican government.[703] Scholars describe the essence of the clause to be the ability of the people to exercise sovereignty and to change their form of government.[704]

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699 Historically, it is clear that Congress will rarely exercise its Guarantee Clause powers. *See* ELAZAR, *supra* note 513, at 191.

700 *See* Chemerinsky, *supra* note 691, at 870–71; Merritt, *supra* note 522, at 75; Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1040, 1042–43, 1060 (1985). The Guarantee Clause "provides the only instance where the government by its corporate name is given a duty." Bonfield, *supra* note 682, at 523. This terminology "intimate[s] that the obligation rests on all the departments of the government, in their appropriate spheres." *Id.*

701 *See* THE FEDERALIST NO. 39, at 251 (James Madison) (J. Cooke ed., 1961); Amar, *supra* note 691, at 764 (citing THE FEDERALIST NO. 39, at 240–41 (James Madison) (Clinton Rossiter ed., 1961); Merritt, *supra* note 683, at 816. For a discussion of what republicanism meant to Americans at the time the republic was created, see WOOD, *supra* note 7, at 47–75. Early Americans believed that devotion to the public good constituted the essence of a republican government and that vesting power in the people rather than the Crown achieved it. *See id.* at 55–56.

702 *See In re* Duncan, 139 U.S. 449, 461 (1891) (stating that the distinguishing feature of a republican form of government is the right of the people to choose officers and pass laws); Amar, *supra* note 691, at 749–51, 762.

703 *See* WOOD, *supra* note 7, at 595–97.

704 *See* Amar, *supra* note 691, at 762–766; Gwyn, *supra* note 614, at 71; Merritt, *supra*

The clause already has been given some content. Agreement exists that the Framers of the clause sought to ensure citizen participation at the state level of government, giving the federal government the right and duty to prevent the formation of state monarchies or autocracies and to quell rebellions against established state governments.[705] Although some view a representative form of government as one in which the representatives' decision making cannot be supplanted by the voters' exercise of power through initiatives or referenda, the Supreme Court has shielded their use, treating the legitimacy of these direct democracy devises as political questions best left for legislative determination.[706]

Another factor undermining the indeterminacy argument lies in the Court's willingness to give content to the equally, if not more so, vague Equal Protection and Due Process Clauses. Further, the Court has not labeled the even more indeterminate Tenth Amendment nonjusticiable.[707]

3. *The Guarantee Clause Should Restrain the Judiciary as well as the Legislative and Executive Branches*

Would it be incongruous for the Court to make the Guarantee Clause justiciable as a restraint upon the federal branches of government but nonjusticiable as to state actions that may be questioned as antirepublican? The answer is no because both positions uphold federalist principles.[708] Judicial willingness to adjudicate federal actions that raise the specter of interference with a state's republican character both uphold the enforceability of the clause and shield a state's republican government from federal encroachment that would

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note 522, at 23.

[705] *See* Amar, *supra* note 691, at 763–64 (citing THE FEDERALIST NO. 39, at 243, 246 (James Madison) (Clinton Rossiter ed., 1961)); Bonfield, *supra* note 682, at 517–22; Chemerinsky, *supra* note 691, at 867; Nagel, *supra* note 691, at 844.

[706] *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149–51 (1912); Washington v. Manussier, 921 P.2d 473, 481–82 (Wash. 1996); Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247, 253–56 (1997); Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 714–16 (1994).

[707] *See* Printz v. United States, 521 U.S. 898, 923, 923 n.13 (1997) (stating that the Tenth Amendment explicitly endorses a federal system of dual sovereignty); United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (finding Gun-Free School Zones Act interferes with state sovereignty essential to the federal balance designed by the Constitution); New York v. United States, 505 U.S. 144, 155–60, 177, 183–84 (1992) (finding that attributes of state sovereignty reserved by the Tenth Amendment limit Congress's Article I powers); Janice C. Griffith, New York v. United States: *Has the Tenth Amendment Been Resuscitated?*, 16 URB. ST. LOC. L. NEWSL., Summer 1993, at 1, 11–12.

[708] *But see* Bonfield, *supra* note 682, at 559 (arguing that protection of the people from abusive state governments is foremost among the Guarantee Clause's objects).

eviscerate it.[709] When the Court, under the political question doctrine, forces state and local dissidents to resolve their grievances against the exercise of state power in the capitol rather than the court house, it prevents persistent and lengthy challenges to state power that weaken a state's effectiveness.[710] The Guarantee Clause should be justiciable where, in areas outside of the political question doctrine, it can be administered to protect state autonomy from overly intrusive federal intervention.[711] The duty placed upon the federal government to protect republican government at the state level clearly requires federal restraint from deep intrusions into a state's separate autonomy that imperil its republican government.[712] It is far more conceivable at the beginning of the second millennium that a state would lose its republican form at the hands of the federal government than by actors at the state level of government.[713]

In this era of widespread judicial review, the Guarantee Clause's effectiveness depends upon its applicability to the federal judiciary as well as to Congress.[714] Certainly, the nonjusticiability doctrine, which has checked appeals to examine the states' form of republican government, should not bar the judiciary from making inquiry into its own remedial practices that undercut representative democracy.[715] The judiciary has an obligation to follow the Constitution, even if it foregoes ruling on it. The political question doctrine serves to restrain the Court from ruling on issues that clearly fall within the responsibilities assigned to the Congress or the President, the political branches of

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[709] Without specifically mentioning the Guarantee Clause, the Court in *Alden v. Maine* invalidated Congress's authorization of private suits in state courts to enforce federal statutes without the consent of the states as an unwarranted intervention in state representative government. The Court stated that federal "authority over a State's most fundamental political processes . . . strikes at the heart of the political accountability so essential to our liberty and republican form of government." *See* 119 S. Ct. 2240, 2265 (1999).

[710] For a list of cases in which the Supreme Court refused to adjudicate the merits of state actions alleged to violate the Guarantee Clause, see Bonfield, *supra* note 682, at 556–57.

[711] *See* Merritt, *supra* note 522, at 75–77.

[712] *See id.* at 25.

[713] In the 1990s, for example, Congress enacted many criminal laws, an area traditionally reserved to the states and their localities. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994 ("Three Strikes law"), § 70001 (2), 18 U.S.C. § 3559(c)(1) (1994); The Anti-Car Theft Act of 1992, Title I, § 101, 18 U.S.C. § 2119 (1994); Gun-Free School Zones Act of 1990, Title XVII, § 1702, 18 U.S.C. § 922 (q)(1)(A) (1994). Contemporary values should dictate the specific substance of a republican government within the limits imposed by the historical understanding of the clause. *See* Bonfield, *supra* note 682, at 560.

[714] *See* Anderson, *supra* note 518, at 138, 149 (viewing the failure of the Constitutional Convention to adopt a Council of Revision, proposed in the Virginia Plan, as instrumental in "the development of a kind of judiciary that is problematic in a representative democracy").

[715] The Guarantee Clause's guarantee to the states of republican government was intended to encompass the people or community as distinguished from a government. *See* Bonfield, *supra* note 682, at 545.

the United States. The nonjusticiability doctrine should not bar the judiciary from applying the Guarantee Clause to itself.

Because the Court has shown itself ready to rely upon the Guarantee Clause to restrain Congress from interfering with state autonomy,[716] it should make the Clause applicable to the federal judiciary as well by placing limits upon remedial actions that are so antimajoritarian in character as to severely curtail republican rule.[717] The unelected members of the federal judiciary should not assume executive and legislative roles through the imposition of equitable remedies in structural reform litigation. A state's republican form of government, guaranteed by the Constitution, vests the latter responsibility in elected officials who serve as representatives of the people. The Clause's guarantee of representative democracy surely forecloses judicial assumption of the state's most central and democratic decision making—taxation and the allocation of scarce resources.

Benefits accrue from the activation of the Guarantee Clause. In interpreting the Clause, the Court would need to more fully isolate the structural elements that make the states viable partners in the Constitution's federal framework.[718] Revitalizing the Guarantee Clause would further serve the goal of making the federal judiciary more conscious of the impact that its decreed remedial processes have upon republican government at the state level.[719] The Court should monitor

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[716] *See* Coyle v. Oklahoma, 221 U.S. 559, 567–68 (1911) (invalidating federal enabling act for admission of Oklahoma to the union insofar as it dictated the location of the state capital).

[717] The words "The United States shall" in the Guarantee Clause indicate that the judiciary and the other federal branches are mandated to enforce the Clause. *See* Bonfield, *supra* note 682, at 523. Should the Court interpret the Clause to be fully justiciable, the Court as well as the Congress would enforce the Clause to ensure the maintenance by the states of republican governments. *See id.* at 564. Even if the Court continues to make the Clause nonjusticiable against state actors, it should review congressional action that eviscerates the Clause's guarantee. *See id.* at 564. Arthur E. Bonfield argues: "For judicial abstinence would give Congress unlimited power to impose on the states whatever government it deemed republican. Not only would such authority spell the complete end of our federal system, but it would also create an unchecked power capable of destroying rather than guaranteeing republican government." *Id.* at 564–65.

[718] *See* Bonfield, *supra* note 682, at 559–60 (arguing that the scope of the obligation imposed by the Guarantee Clause must reflect both historical understanding and contemporary values and expectations); Briffault, *supra* note 522, at 1336 (stating that "[t]he assurance of the continued independent existence of the states grows out of the guarantees of a republican form of government").

[719] In *Alden v. Maine*, the Court acknowledged that Congress's abrogation of the states' sovereign immunity from private suits to enforce federal laws blurred the "separate duties of the judicial and political branches of the state governments. . . ." 119 S. Ct. 2240, 2265 (1999). The Court opined that the displacement by the judiciary of "a State's allocation of governmental power and responsibility" caused it "to assume a role not only foreign to its experience but beyond its competence as defined by the very constitution from which its existence derives." *Id.* The Court stated that the preservation of representative government depended upon deliberation

the exercise of its own antimajoritarian remedial processes to ensure that their scope does not abridge republican government.[720] The Court enjoys a discretion in its choice of measures to enforce both the Fourteenth Amendment and the Guarantee Clause; the selected means should be necessary and proper.[721]

Present jurisprudence, with its focus on the protection of civil rights and individual liberties, should be developed to include the Guarantee Clause's assurance that states shall be governed by representative processes. A balance between representative governmental rule and the need to protect individual liberties must be maintained.[722] This balance can best be achieved by highlighting the protections the populace receives from the Constitution's vertical as well as its horizontal checks and balances. The Court should place greater emphasis upon the *Milliken v. Bradley* (*Milliken II*) equitable principle that calls for the collective interests of a state and its local authorities to be considered in the design of equitable remedial decrees.[723] This acknowledgment of majoritarian interests, recognized in the language and policies underlying the Guarantee Clause, should cast in doubt the Court's sanction in *Jenkins* of district court-ordered taxation that bypassed majoritarian political controls.[724]

Other rulings also show that the Court respects a republican government at

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by the political processes to allocate scarce resources among competing interests and rejected decision making by "judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.*

[720] The Clause can serve as a positive reminder to the judiciary that majoritarian processes curb its powers in pursuing institutional litigation to some extent, thereby requiring it to tailor remedies narrowly, as *Hills v. Gautreaux*, 425 U.S. 284 (1976), dictates. The *Hills* Court stated: "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Id.* at 293–94 (quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)).

[721] *See* Texas v. White, 74 U.S. (7 Wall.) 700, 729 (1868).

[722] *See* ELY, *supra* note 14, at 7 (arguing that majoritarian democracy constitutes the core of the American governmental system); Bonfield, *supra* note 682, at 557–58 (explaining that as the Court expanded its interpretation of the Fourteenth Amendment to protect the people against abusive and antirepublican state actions, it relinquished the exercise of power under the Guarantee Clause).

[723] In *Milliken II*, the Court stated that the "interests of state and local authorities in managing their own affairs, consistent with the Constitution," should be taken into account in devising equitable remedies to correct constitutional violations. 433 U.S. 267, 281 (1977).

[724] Professor Paul J. Mishkin describes the tendency of institutional remedial decrees to do the following: (1) expand the definition of constitutional rights, (2) address more issues than the constitutional violation that justified judicial intervention, (3) bypass majoritarian political controls, (4) allocate or reallocate state resources, and (5) involve continuing oversight of governmental institutions for protracted periods of time. *See* Mishkin, *supra* note 4, at 955–59. These decrees involve the take over of state or local governmental institutions without provision for representation of all affected interests. *See id.* at 970–71. Congress's structural controls over the federal judiciary, which are derived from the Constitution, shield it from the antirepublican measures the federal judiciary has taken to reform state institutions. *See id.* at 969–70.

the local and state level.[725] The Court, when engaged in remedial action, has stopped short of restructuring a state's public education laws and school district organization in order to preserve local representative government.[726] Although the Court must never lose sight of its duty to protect individual liberties from majoritarian impulses, the legislative branches better achieve effective, wholesale political reforms.[727]

4. *Obstacles to Making Federal Action Justiciable Under the Guarantee Clause*

a. *The Guarantee Clause Must Be More Firmly Declared Justiciable*

At present, the application of the Guarantee Clause to the federal judiciary's remedial powers must clear a number of hurdles that jurisprudence surrounding the Clause has left unresolved. First, the Court must express more forcefully that the Clause is indeed justiciable. How many members of the Court share Justice O'Connor's willingness to view the Clause as a constitutional restraint upon Congress and one not entirely foreclosed by the political question doctrine remains unclear.

Further, the Court would have to embrace more strongly the notion that the Guarantee Clause restrains the branches of the federal government, as well as the states, from actions that restrict the exercise of republican government at the state level. In *Coyle v. Oklahoma*,[728] the Court held that Congress could not dictate the location of the Oklahoma state capital,[729] finding that the Guarantee Clause did not bestow upon Congress the power to admit a new state with qualifications that

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[725] *See, e.g.*, Alden v. Maine, 119 S. Ct. 2240 (1999) (invalidating congressional authorization of private party lawsuits to enforce federal statutory law as violating the states' constitutional sovereign immunity and impinging upon representative government); Gregory v. Ashcroft, 501 U.S. 452 (1991) (finding that the mandatory retirement provisions of the Missouri Constitution did not violate the Equal Protection Clause); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding Texas school financing system based on local real property taxation did not violate the Equal Protection Clause).

[726] *See* Milliken v. Bradley (Milliken I), 418 U.S. 717, 741–44 (1974) (declining to affirm a district court's interdistrict, metropolitan remedy, in the absence of interdistrict constitutional violations, to desegregate Detroit's public school system by expanding its boundaries to include 54 independent school districts for the achievement of greater racial integration).

[727] *See* COX, *supra* note 511, at 88 (pointing out the legislative nature of school desegregation decrees and arguing that the courts need the cooperation of the political branches to further integration because "legitimacy . . . flows from the processes of democratic self-government").

[728] 221 U.S. 559 (1911).

[729] *See id.* at 564–65. The 1906 federal enabling act for Oklahoma's statehood admission provided that Guthrie should be the capital of the state until 1913. *See* Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).

denied it the equality enjoyed by states already admitted to the Union.[730] The Court thus found that the Clause should apply to federal acts that intrude deeply into the sphere of state sovereignty.[731] This ruling reinforces the view that the Clause, designed to protect republican rule, acts as a restraint, upon both the states and the federal government, from taking measures that compromise a republican government at the state and local level.

b. *Manageable Standard to Guide the Application of the Guarantee Clause Must Evolve*

Workable standards for the Guarantee Clause can evolve by ascertaining core state functions deemed essential to a state's republican government[732] and prohibiting all three federal branches from assuming them. For example, the Court in *Gregory v. Ashcroft* found that a state's authority to determine the age qualifications of its judges to be one that went to the "'heart of representative government.'"[733] The standards would be similar to those established under a

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730 *See Coyle*, 221 U.S. at 567–68.

731 The Court, in *Coyle*, stated:

> The argument that Congress derives from the duty of "guaranteeing to each state in this Union a republican form of government," power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit. It may imply the duty of such new state to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican—but it obviously does not confer power to admit a new state which shall be any less a state than those which compose the Union.

Id. at 567–68 (citation omitted). The Court's more recent decisions in *Alden v. Maine* and *New York v. United States* suggest that a majority of the Court believes that the Guarantee Clause applies to federal acts that intrude too deeply upon the states' residuary sovereignty. In *Alden*, the Court invalidated a congressional abrogation of state sovereign immunity that facilitated private party lawsuits to enforce federal statutory law. *See Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999). Justice Kennedy, writing for the majority, opined that compensatory damages awarded to the litigants in state courts could cripple representative government by reallocating scarce resources. *See id.* at 2264–65. In *New York*, the Court found that provisions of a federal statute regulating nuclear waste did not violate the Guarantee Clause. *See New York v. United States*, 505 U.S. 144, 183–86 (1992); *see also* Merritt, *supra* note 683, at 819–22 (arguing that the Guarantee Clause restrains Congress from actions that would destroy state republican government as well as empowers Congress to intervene to restore republican government).

732 *See* Bonfield, *supra* note 682, at 570 ("[The Guarantee Clause] can only be used to safeguard those fundamental values that we deem too important to be left to the whim of the various states."); THOMAS H. ODOM, INTERNATIONAL MUN. ATTORNEYS ASS'N, ANNUAL SEMINAR: CHALLENGING THE VALIDITY OF DOL'S PART 541 REGULATIONS AS APPLIED TO PUBLIC-SECTOR EMPLOYERS AFTER *AUER V. ROBBINS* OR, WHAT'S *AUER* NEXT MOVE ON *AUER*LY OVERTIME PAY?," 25 (1997).

733 501 U.S. 452, 461 (1991) (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

federal structural test except that they would focus singularly on whether the imperiled state function constituted a core function lodged in the state's elected representatives by the Constitution. In *Alden*, the Court focused on this very issue. It pinpointed the role played by the imperiled state function in the Constitution's federal design.[734] The Court held that congressional authorization of private lawsuits for compensatory damages in state courts to enforce federal statutes displaced the states' most fundamental political processes—its resource allocation decision-making processes.[735] The Court viewed this action as "[striking] at the heart of the political accountability so essential to our... republican form of government."[736]

Court-ordered remedial action to correct constitutional violations at the state and local levels entails the loss of some representative government. The question becomes one of degree—at what point does a court's remedial dictates result in such a loss of republican government that the federal judiciary can be charged with violating the Guarantee Clause regardless of Supremacy Clause implications. This Article advocates the adoption of a balancing test to guide the prescription of court-ordered fiscal measures. The loss of representative government entailed by judicial remedial orders constitutes one important factor to be considered. A much narrower scope of judicial power has been counseled should remedial taxation be under consideration because intervention in a state's taxation system impairs the state's independent ability to perform its vital functions.[737] The option to impose remedial taxation should be exercised only when (1) a valid state law authorizes such taxation; and (2) all other remedial steps prove unavailable, thus forcing the judiciary to turn to taxation as a last resort remedial action to correct an egregious constitutional violation that otherwise would be plainly remediless.[738] These standards, while difficult to apply, provide a manageable standard of review.

c. *The Guarantee Clause Must Be Applicable to a Partial as well as a Total Loss of Republican Government*

In the 1912 decision, *Pacific States Telephone & Telegraph Co. v. Oregon*, the Court's language suggests that the Guarantee Clause is triggered only when the state's government can no longer be classified as republican in form. The Court stated: "Congress must necessarily decide what government is established

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[734] *See Alden*, 119 S. Ct. at 2263.

[735] *See id.* at 2264–65.

[736] *Id.* at 2265.

[737] *See* Printz v. United States, 521 U.S. 898, 932 (1997) (invalidating provisions of Brady Handgun Violence Prevention Act that required local law enforcement officers to conduct background checks and opining that "balancing" analysis is inappropriate when federal directives "compromise the structural framework of dual sovereignty").

[738] *See infra* notes 859–905 and accompanying text.

in the State before it can determine whether it is republican or not."[739] Antirepublican measures that fall short of destroying a state's republican form of government seem to be foreclosed from judicial review by this language.

In recent rulings, the Court has not seemed bound, however, by the logic of *Pacific States*. In *New York v. United States*, for example, the Court ruled upon distinct provisions of a statute relating to nuclear waste and found them not to violate the Clause.[740] There, the Court entertained the issue of whether a federal statute providing penalties and incentives to encourage the regional development of nuclear waste disposal sites violated the Guarantee Clause.[741] Yet, these provisions failed to reach the magnitude necessary to cause the demise of republican government. Thus, it appears that the earlier *Pacific States* language does not obviate judicial review of legislation that encompasses antirepublican features, but fails to totally eclipse it. Likewise, the Court should be able to review whether a district court's remedial decree violates the Clause notwithstanding the unlikelihood that the order would extinguish the state's republican form of government.

The *Pacific States* approach should be regarded as one that favored nonjusticiability. Making the Clause applicable only when a state government can no longer be characterized as republican in form or substance advances that position. Unless the Court agrees to examine the antirepublican features of specific legislation or court decrees, activation of the Guarantee Clause will not occur because rarely, if ever, would the activity cause the state to lose its republican form of government completely.

E. *Application of Constitutional Limitations to Court-Ordered Remedial Funding*

The judiciary's funding orders, collectively, and perhaps even singly, have the potential to cripple the effective functioning of states and local governments, thereby eviscerating the power these entities possess to check excess federal governmental encroachment.[742] Although institutional-reform judicial orders may correct egregious constitutional violations, they also allocate scarce state and local

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[739] 223 U.S. 118, 147 (1912).

[740] *See* 505 U.S. 144, 183–86 (1992).

[741] *See id.* at 183–84.

[742] *See* Alden v. Maine, 119 S. Ct. 2240, 2264–65 (1999) (finding that congressional removal of state sovereign immunity in state courts from private lawsuits to enforce federal law would result in judicial mandates for compensatory damages that would displace the states' allocation of resources through political processes); Arthur v. Nyquist, 712 F.2d 809, 812 (2d Cir. 1983) (referring to burdens created by cuts in federal funding and federal court decrees imposing costly obligations upon the Buffalo, New York school system, at the same time, to remedy school desegregation and to achieve compliance with federal and state laws concerning the education of handicapped children).

public resources, traditionally considered the prerogative of only elected officials.[743] As the exercise of the courts' remedial decree powers become even more intrusive and expansive, the legislative, as well as the judicial nature, of these decrees must be recognized.

The Framers of the Constitution believed that a republican government could survive only if governmental authority was accountable to the popular will and power was checked and balanced.[744] They viewed the states' power under a structure of dual sovereignty as a vertical check upon national power.[745] The Court cannot ignore the Guarantee Clause's protection of republican government and the Constitution's federal structure that envisions governmental authority vested in the states as well as in the federal government. The judiciary must begin to develop a jurisprudence that acknowledges these factors as restraints upon its remedial decrees. The application of a structural test would restrain the Court from making such orders if the intrusion caused by them so deeply affected state

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[743] In the *Jenkins* remedial process, the judiciary removed power from state and local entities to allocate scarce resources. In *Alden*, the Court invalidated congressional authorization of private lawsuits in state courts for federal law enforcement purposes, reasoning that judicially mandated compensatory damages caused an unanticipated intervention in the states' allocation of scarce resources through their political processes. *See Alden*, 119 S. Ct. at 2264. The Court stated that such court-mandated damages "could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design." *Id.* at 2264. *See* Robinson, *supra* note 518, at 46–47 (arguing that the role of modern governments is to allocate resources among competing goals and to make wise balancing choices among the inevitable goal conflicts). A 1995 report prepared by New York State's Temporary State Commission on Constitutional Revision stated that in its conversations and public hearings around the state people made clear to them their concern with the following: "central, practical issues with which governments are supposed to deal: the *quality and cost of education* . . .; safety from violence . . .; a method for keeping the burden of taxation within reason; and the assurance of fiscal integrity in government at both the state and local levels . . . ." Alan Finder, *Gridlocked Government Must Be Overhauled, Panel Says*, N.Y. TIMES, Feb. 25, 1995, at 28 (emphasis added).

The bipartisan Commission on Constitutional Revision, which was appointed by former New York Governor Mario M. Cuomo to prepare for a possible state constitutional convention, proposed that advisory panels be created to recommend governmental restructuring in the following four areas: elementary and secondary education, the criminal justice system, state fiscal practices, and the relations between the state and local communities. *See id.* The Commission's 1995 report thus documents expectations that state and local government, not the federal judiciary, should set policy in the areas of educational quality and cost. It also notes peoples' fears that governments frequently fail to address taxation burdens and the need for fiscal integrity.

[744] *See* Robinson, *supra* note 518, at 48–49.

[745] *See* THE FEDERALIST NO. 46, at 297–300 (James Madison) (Clinton Rossiter ed., 1961) (expressing optimism that the states possess the ability to thwart federal encroachments upon their powers); THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (finding security against tyranny in the federal separation of powers between "two distinct governments").

and local governmental processes as to change the constitutional design of the federal structure.[746] Likewise, the Guarantee Clause restrains orders that diminish the ability of state or local elected officials from making policy with respect to a state's core functions.[747]

The judiciary's exercise of local legislative and executive power also violates the Constitution's separation of powers into three distinct branches. Federal courts should focus on proper governmental functioning rather than the application of the same rule to every case involving remedial action.[748] The Court should use a balancing test and weigh the goal of obtaining maximum fiscal resources to correct constitutional violations against the ability of the locality to support such a remedial course of action. This approach would eliminate maxims now espoused by the federal judiciary to the effect that cost considerations have no bearing upon the remedial measures ordered.[749] Further, the extent to which the judicial remedial process intrudes upon or replaces state and local functions should be considered. The notions of comity dictate this consideration.[750] Any judicial action that displaces or destroys the integrity of local and state governmental processes or their core functions should be unacceptable.

F. *Application of Constitutional Limitations to Court-Ordered Taxation*

When the district court orders a school district to tax without state authorization, as sanctioned in *Jenkins*, it performs a legislative function that supersedes the legislative processes of a state's republican government. By such action, the federal judiciary deprives the citizenry of the effects of legislation, not found to be constitutionally infirm, that its duly elected representatives have enacted. Certainly, such orders abridge the state's republican form of government guaranteed by the Constitution because the authority of the people to determine the means of support for their government lies at the heart of representative government.[751]

Judicial taxation orders clearly infringe upon the constitutional federal

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[746] The Court clearly approached this state of affairs in *Jenkins*.

[747] *See supra* notes 732–36 and accompanying text.

[748] *See* Lessig, *supra* note 368, at 161 (defining formalism as a type of legal reasoning that seeks categorical resolutions where possible in contrast to a balancing approach).

[749] *See supra* notes 364–80 and accompanying text.

[750] *See supra* notes 655–73 and accompanying text.

[751] *See* Alden v. Maine, 119 S. Ct. 2240, 2264–65 (1999) (opining that representative government cannot be preserved if judicial awards for compensatory damages create staggering burdens, thereby displacing the role the states' political processes play in the allocation of scarce resources). In *Gregory v. Ashcroft*, Justice O'Connor, writing for the majority, opined that a state's authority to establish the qualifications for its governmental officials lies at the heart of representative government. *See* 501 U.S. 452, 463 (1991). The exercise of taxation powers parallels, if not exceeds, the importance of determining officers' qualifications.

structure because a state's taxation powers constitute one of its most fundamental sovereign powers.[752] Removed of its jurisdiction over taxation, a state lacks sovereignty.[753] The elimination of even a portion of the states' taxing powers by either Congress or the judiciary clearly forecloses the ability of states to function as contemplated by the Constitution's federal structure.[754] Judicial taxation orders that undermine the role states play in a federal system eviscerate the states' ability to further liberty by acting as a separate check against federal dominance, corruption, or incompetence.

Court-ordered remedial taxation deviates from the Constitution's structure of separated powers. The federal judiciary lacks the power to tax because its Article III powers do not encompass taxation, a power explicitly given to the legislative branch.[755] Indeed, it has been argued that the judiciary's Article III powers do not encompass structural reform injunctions that strip states of basic responsibilities.[756] These injunctions usually involve the type of remedial funding discussed in this Article.

Applying formalist principles, the Court would conclude that the judiciary's exercise of a power granted to the legislative branch violates the system of separated powers established in the Constitution. Should the Court resort to a functionalist mode of analysis, it would conclude likewise that taxation orders violate separation of powers values. The power of taxation is a critical, essential power for a legislative body to possess.[757] Displacement of this power, even in a relatively small sphere of operation, deeply intrudes into state and local decision making by eviscerating governmental power to raise revenues and make resource allocation decisions. Further, the exercise of judicial taxation power is neither expressly nor implicitly granted to the federal judiciary.[758] The Framers viewed

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752 *See* Meriwether v. Garrett, 102 U.S. 472, 515 (1880) (stating that taxation constitutes "a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare"); Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 116 (1873) (stating that the power to "raise money is the highest attribute of sovereignty" and may be exercised "by the power of legislative authority only"); Klemm v. Davenport, 129 So. 904, 907 (Fla. 1930) (stating that "[a] 'tax' is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform").

753 Without the power of taxation, a state could not raise sufficient revenues to function as a state in our federal system of government. *See Meriwether*, 102 U.S. at 513–14 (pointing out that taxes are "imposts levied for the support of the government, or for some special purpose authorized by it").

754 *See, e.g.*, *Rees*, 86 U.S. (19 Wall.) at 116–17 (stating that it is "beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority (taxation) at once so delicate and so important").

755 *See* Nagel, *supra* note 602, at 667; Yoo, *supra* note 4, at 1147–51.

756 *See* Yoo, *supra* note 4, at 1149–50.

757 *See supra* notes 752–54 and accompanying text.

758 *See* Yoo, *supra* note 4, at 1149 (concluding that the Constitution's text and framework

the judiciary as the least dangerous branch precisely because it possessed limited powers.[759] Taxation has never been viewed as a limited power; in fact, early in its history, the Court stated that the power to tax was tantamount to a power to destroy.[760] The judicial assumption in *Jenkins* of state legislative powers violates the spirit, if not any express text, of the Constitution.[761]

The Court has ruled that comity and federalism principles guide its equitable powers by prohibiting use of remedies so intrusive as to affect the independence and functionality of state and local authorities.[762] As demonstrated in *McNary*, the Court honors the principles of federalism and comity to curb the use of equitable powers that would inhibit the collection of state taxes.[763] *Jenkins* held, however, that such principles do not prohibit the federal judiciary from ordering local governmental entities to levy additional taxation to correct constitutional violations.

The difference between invalidating existing taxation and ordering additional taxation seems slight. Reallocating the tax burden in the wake of an invalid tax can strain a state's ability to finance its programs just as ordering additional taxes does. Both forms of judicial power upset the existing tax system and entangle the federal judiciary in state law issues with which it lacks familiarity. Excessive

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do not compel "the conclusion that the federal courts possess the inherent authority to impose equitable remedies upon the states"). *But see* La Pierre, *supra* note 1, at 370–79 (finding an implied judicial power to order taxation unauthorized by state law from the Eighth Circuit *Liddell* and *Jenkins* rulings and state court decisions holding state law restrictions upon tax rates and indebtedness inapplicable to taxes levied to satisfy tort judgments).

759 *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

760 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) (invalidating a state's improper taxation of federal banks and stating "[t]hat the power to tax involves the power to destroy").

761 In *Mistretta v. United States*, 488 U.S. 361, 413 (1989), Justice Scalia dissented from the Court's holding that the Congress permissibly delegated its legislative power to a Sentencing Commission, comprised in part of at least three federal judges, to establish sentencing guidelines. Justice Scalia opined that Congress's delegation of broad policy responsibility to another branch constituted an unconstitutional delegation of its legislative power. *See id.* at 415. He stated that "the basic policy decisions governing society are to be made by the Legislature." *Id.*

762 *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 108–09 (1981) (explaining that principles of comity bar federal courts from granting relief to state taxpayers challenging allegedly unconstitutional administration of state tax systems because state collection of revenues is deemed essential for states to maintain their independence); *see also* Hogan v. Musolf, 471 N.W.2d 216, 220–22 (Wis. 1991) (affirming the independence of the states as the policy recognized in *McNary* for federal judicial restraint from interference with state administrative procedures to address state tax claims); Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review, 642 A.2d 1251, 1264 n.9 (Del. Super. Ct. 1993) (citing Younger v. Harris, 401 U.S. 37 (1971)).

763 *See McNary*, 454 U.S. at 108–09.

judicial intrusion into complex state tax matters occurs in each case. The question presents only an issue of the degree of intrusiveness. At most, an argument can be made that ordering additional taxation, as in *Jenkins*, is less intrusive than interfering with the administration of the state's tax system because exercise of the former remedy allows for the continuing operation of the tax structure.[764] But one can argue just as forcefully that the intrusiveness of an order requiring the legislature to raise taxes far exceeds the burden of restrictions placed upon the mode of taxation. Invalidating a tax entails significantly less impact upon legislative and executive discretion than a judicial requirement to increase specific items in a state or local budget.[765]

The foreclosure, on the basis of comity principles, of all equitable remedies implicating a state's taxation powers arguably would be overly broad in scope. Yet, the assumption of judicial taxation power certainly violates the notion of restraint that comity has come to signify. The criticism that comity principles are indeterminate can be assuaged by judicial consideration of (1) the values of respect and restraint that comity represents, (2) the strength of a state's interest in the particular area subject to judicial intervention, and (3) the degree of intrusiveness entailed by the Court's proposed remedial action.

G. *Application of Constitutional Limitations Overriding State Law Limitations*

In *Jenkins*, the Court opined that the district court could set aside state law limitations that impeded a local government's ability to raise funds to satisfy its constitutional obligations.[766] This ruling sanctioned court-ordered taxation for which no underlying state authorization existed.[767] The federal judiciary thus assumed the role of the state legislature, either as the creator of the new remedial tax authorization or as a governmental body removing state statutory fiscal limitations.

Although the judicial power extends to all cases arising under the

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[764] *See* National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 590 (1995). In *National Private*, an action challenging certain state taxes as violative of the Dormant Commerce Clause, the Court found that Oklahoma courts were precluded from awarding declaratory or injunctive relief under 42 U.S.C. § 1983 when an adequate legal remedy existed. *See id.* at 590. The Court said that this interpretation was supported by the "background principle of federal noninterference" in tax cases discussed in. *McNary*. *See id.*

It can be argued that in *Jenkins* the judiciary prohibited the continuing operation of the existing tax structure because the district court barred the operation of state law limitations. *See supra* notes 298–302 and accompanying text.

[765] *See* Frug, *supra* note 364, at 758–59.

[766] *See* Missouri v. Jenkins, 495 U.S. 33, 54, 57 (1990).

[767] *See supra* note 430 and accompanying text.

Constitution,[768] this empowerment should be tempered with respect for the Constitution's federal structural framework.[769] Overruling neutral state laws, the provisions of which do not violate the Constitution, not only tilts the framework toward federal interests, but it also impairs the states' ability to keep in place legitimately enacted fiscal constraints that its citizenry believe desirable or necessary. Displacing state law limitations not enacted to frustrate federal constitutional requirements ignores the Constitution's guarantee to the states of a republican government that ensures the citizenry's empowerment through elected representatives. The federal structural framework of viable states coexisting with a federal government would be better preserved if district courts refrain from acting as state legislatures and simply command a state governmental entity to remedy a constitutional violation without specifying particular tax levies. This course of action would result in less intervention in executive and legislative decision making.[770]

Adherence to horizontal separation of powers principles precludes the federal judiciary from abrogating neutrally enacted state laws not designed to thwart constitutional commands. When a district court strikes down a valid state law limitation that impedes its remedial process, it performs a legislative act. Strict application of separation of powers principles preclude the judicial assumption of legislative powers.[771] When one focuses on the ability of the states to function in a federal system—a functionalist approach to the Constitution's separation of powers—one concludes that any judicial action to change a state's law with respect to its taxation functions intrudes deeply into local and state governmental processes.[772] Given the wide range of remedial options available to the federal judiciary, setting aside a state's laws that bear no infirmity other than their restriction upon taxation cannot be supported under the separation of powers doctrine.

The federal judiciary ignores comity and federalism concerns when it prevents the operation of constitutionally valid state law limitations that impede the swift exercise of equitable remedies. Removing the effect of these legitimate

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[768] U.S. CONST. art. III, § 2.

[769] The judiciary, by defining constitutional rights, commanding state and local fiscal support of their fulfillment, and then supervising expenditures for this purpose, concentrates power in itself to perform judicial, legislative, and executive functions. *See* Frug, *supra* note 364, at 733. The Framers of the Constitution did not contemplate this centralization of power. *See id.*

[770] *See* Frug, *supra* note 364, at 758–59 (pointing out that judicial mandates to increase government expenditures significantly impact upon executive and legislative discretion).

[771] *See* Yoo, *supra* note 4, at 1123–24 (arguing that if a court cannot correct a constitutional violation through its traditional remedial power, separation of powers principles preclude a judicial solution and require the answer to come from the political branches).

[772] *See* Yoo, *supra* note 4, at 1135 (finding the district court's enjoinment of state law in *Jenkins* to be more intrusive than the federal statute invalidated in *New York v. United States*); *supra* notes 650–54 and accompanying text.

laws constitutes far more than minimal intrusion—it forecloses the operation of law created by the state's citizenry or its elected officials. Such judicial action expresses contempt rather than respect for the integrity and functionality of state and local governments. In *North Carolina State Board of Education v. Swann*, the Court struck down a state law designed to prevent the implementation of a court-ordered desegregation remedy. The law invalidated there failed to further legitimate goals.[773] In *Jenkins*, however, the Court expressed the view that the district court could set aside state laws enacted for lawful purposes that impeded the exercise of its remedial powers.[774] The doctrine of comity should be applied to overrule *Jenkin*'s extension of the *Swann* decision. Ordering a state to ignore its constitutionally enacted laws defies the practice of comity that calls for extending courtesy to another jurisdiction's integrity and autonomy by treating it with proper respect.

VI. PROPOSED STANDARDS TO GUIDE THE FEDERAL JUDICIARY'S IMPOSITION OF FISCAL REMEDIES

In fashioning state and local funding remedies to correct constitutional violations, the United States Supreme Court relies upon different principles that have the inherent capacity to produce conflicting results. The Court adamantly asserts that the cost of a remedy should not bar its use and that state law limitations upon spending do not preclude federal court-ordered fiscal remedies.[775] The Court also continues to emphasize the applicability of the principles of comity and federalism, which if observed, would take into consideration the cost of the remedy and its intrusive effect upon state and local affairs.[776]

The federal judiciary should abandon its categorical rules that ignore remedial costs and state law limitations[777] and replace these rules with a balancing test that will cause courts to evaluate the intrusiveness of the remedy upon state and local interests as well as its effectiveness in remedying constitutional violations.[778] Federalism concerns, including the extent to which

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[773] *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45–46 (1971). The North Carolina antibusing law prohibited pupil assignment on the basis of race, making it impossible to eliminate dual school systems held unconstitutional in *Brown v. Board of Education* (*Brown I*).

[774] *See* Missouri v. Jenkins, 495 U.S. 33, 51 (1990).

[775] *See supra* notes 365–418 and accompanying text.

[776] *See supra* notes 367–70, 435–65 and accompanying text.

[777] *See supra* notes 364–70 and accompanying text.

[778] Institutional reform litigation, political in nature, involves judges in political bargaining, a process of compromise and balancing of conflicting interests. *See* Diver, *supra* note 4, at 88–94. The role of the judge becomes one of spurring governmental actors to protect the rights of minority and disenfranchised populations through restructured institutions. *See id.*

the remedy will displace local law and the magnitude of the remedy's financial impact, should constitute factors that the judiciary considers in applying a balancing test. This balancing of interests should occur as part of the remedial process in all areas of institutional reform litigation, including court-ordered desegregation remedies.[779]

This Part proposes a balancing test, based upon *Milliken II*'s three-part test,[780] to guide the imposition of court-ordered funding remedies in institutional reform cases. The *Milliken II* test directs a district court to formulate remedies that address the nature and extent of the constitutional violation.[781] The goal of the test is to restore the victims of constitutional violations to the position they would have occupied in the absence of such violations.[782] Under the third prong of the test, the district court must weigh the interests of local officials in managing their own affairs.

A. *Proposed Interest Balancing Test*

In devising remedies to correct constitutional violations found in the delivery of state and local governmental services, the federal judiciary should evaluate and

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at 92.

Professor Vicki Jackson has emphasized the practicalities involved in the Court's adjudication of federalism restraints upon Congress's power. *See* Jackson, *supra* note 94, at 2228–30. She states that "[a]djudication is a form of governance as well as a form of principled decisionmaking. Too much attention to pragmatics deprives the Court of its unique basis for legitimacy; too little, and the Court veers into a misguided quest for academic purity at the expense of its governmental function." *Id.* at 2228 (citations omitted).

[779] *See* Jackson, *supra* note 94, at 2257 (rejecting the use of categorical rules to adjudicate federalism constraints on federal legislative power and arguing instead for a "deferential, 'all-things-considered' approach" to developing any constitutional limits upon congressional mandates to state governments). A test based upon a balancing of interests carries some disadvantages. A balancing test introduces greater indeterminancy than categorical rules. When the legal system fails to apply a rule consistently, the power of judicial review decreases because judicial decision making appears to be based upon nonlegal factors that are political in nature. *See* Lessig, *supra* note 368, at 173–74. A federal court undoubtedly will find it difficult to determine whether a federal interest outweighs the adverse impact of a particular action upon a state. *See* Tushnet, *supra* note 548, at 1636–38. Federal courts are likely to favor federal interests in the application of a balancing test. *See id.*; Yoo, *supra* note 4, at 1134.

[780] *See supra* notes 86–88 and accompanying text.

[781] *See* Friedman, *supra* note 1, at 743 ("The first prong [of the *Milliken II* test] essentially is a 'fit' requirement: the remedy must fit the right violated, exceeding it in neither scope nor nature . . . an inherently subjective process."); Yoo, *supra* note 4, at 1132 (criticizing this remedial rule as "unhelpful in practice").

[782] *See* ELY, *supra* note 14, at 88 (supporting a representation-reinforcing approach to judicial review because judges as political outsiders and experts on process are well suited for this task); Friedman, *Remedies*, *supra* note 1, at 746–47 (interpreting the compensatory nature of the goal to be in conflict with the prospective relief ordered in school desegregation cases).

weigh the following factors:

(1) the need to tailor the scope of the remedy to fit the nature and extent of the constitutional violation;

(2) the need for the court's decree to be remedial in nature and, to the extent possible, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct;

(3) the extent to which the proposed remedial actions affect the interests of state and local authorities in managing their own affairs, including:

(a) the cost of the proposed remedial actions;

(b) the ability of state and local resources to fund the proposed remedial actions;

(c) the extent to which the remedial actions will violate valid state and local laws; and

(d) the extent to which the remedial actions will require the judiciary to displace state and local governmental administration and decision-making processes, including representative rule.

This test generally follows *Milliken II*'s three-part test. Once a constitutional violation is found, the court examines the remedies available to correct the violations pursuant to the first and second parts of the proposed test. The third part of the test incorporates additional factors for the judiciary to consider in weighing state and local interests.

The first part of the *Milliken II* test provided that "the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation."[783] Later rulings emphasized a close nexus between the constitutional violation and the remedy designed to correct it.[784] The proposed first factor reiterates the current phrasing of the *Milliken II* test that requires a remedial course of action to address the injury caused by the constitutional violation.[785] The suggested second factor recognizes the need to afford remedies to those whose rights are violated and to restore the victims of constitutional violations to the position they would have occupied in the absence of such violations. Its

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[783] *See* Milliken v. Bradley (Milliken II), 433 U.S. 267, 280 (1977).

[784] *See* Hills v. Gautreau, 425 U.S. 284, 293–94 (1976) (stating that once a constitutional violation is found, a court "is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation'"); Jenkins v. Missouri, 931 F.2d 470, 480 (8th Cir. 1991) ("[D]ecrees must directly address and relate to the constitutional violation itself."); Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) ("[T]he power of a federal court to issue injunctive relief is circumscribed by the nature and extent of the constitutional violation.").

[785] Federal courts have been criticized for engaging in remedial action that addresses societal conditions beyond those found to violate the Constitution. *See* Friedman, *supra* note 1, at 738 ("What emerges from a study of the law of remedy and enforcement . . . is the picture of a system in which there is tremendous flexibility in the fit between right and remedy."). A court may reject the cheapest and most effective remedial measures. *See id.* at 743–46.

phraseology admits, as does the *Milliken II* test, that such restoration is not possible for all victims of constitutional violations. Institutional remedies usually require a prolonged period of implementation and often fail to provide relief to the plaintiffs who initiated legal action many years earlier.[786]

B. Milliken II *Adopted an Interest Balancing Test to Implement School Desegregation Remedies*

Milliken II's three-part test constitutes an "interest balancing" test once the courts treat its local interests factor as an equitable principle that must be considered. The Court in its 1995 *Jenkins* decision stressed that the latter interests cannot be ignored.[787] As stated in *Brown II*, the judiciary must be guided by equitable principles "characterized by a practical flexibility in shaping its remedies and . . . a facility for adjusting and reconciling public and private needs."[788] The federal judiciary must necessarily take into account the practicalities of the situation.[789]

The three rules formulated in *Milliken II* are consistent and compatible with each other only if the locality possesses both the resources available and the will to completely vindicate the victims' rights.[790] Since American society continues to define people by their color[791] and shows little willingness to redistribute resources or tax itself enough to assist the underprivileged, the fulfillment of the

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[786] *See* Friedman, *supra* note 1, at 745–47 (criticizing the Court's second prong of *Milliken II*'s three-part test as unrealistically implying that all past harms can be rectified).

[787] *See* Missouri v. Jenkins, 515 U.S. 70, 98 (1995).

[788] Brown v. Board of Educ. (Brown II), 349 U.S. 294, 300 (1955) (footnotes omitted); *see also* ELY, *supra* note 14, at 86–87 (pointing out that the protection of popular democracy and the protection of minorities from denial of equal respect, often viewed as two conflicting ideals, both arise from a common duty of representation).

[789] *See* Evans v. Buchanan, 555 F.2d 373, 379 (3d Cir. 1977) (quoting Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 37 (1971)).

[790] While adherence to *Milliken II*'s third rule (giving weight to the interests of local officials in managing their affairs) frequently conflicts with the rights maximizing rules number one and two, rule number three cannot be characterized as totally at odds with rule two's rights maximizing approach. First, the local interests mentioned in the third rule must be "consistent with the Constitution." Milliken v. Bradley (Milliken II), 433 U.S. 267, 281 (1977). Second, one would hope that a locality's interest could be characterized as benefited by the desegregation of its schools. The present electorate's taste for tax cutting measures, however, may conflict with the remedial quality education mandated by the courts.

[791] *See* Jenkins v. Missouri, 981 F.2d 1009, 1016 (8th Cir. 1992) (stating that the potential for discrimination and racial hostility still exists); BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE 20–23 (1998) (describing race as a social phenomenon and as an element of social stratification); Amy L. Knickmeier, Comment, *Blind Leading the "Color Blind:" The Evisceration of Affirmative Action and a Dream Still Deferred*, 17 N. ILL. U. L. REV. 305, 306 (1997) (pointing out resistance to school desegregation and black church fires as continuing evidence of racism).

three rules remains unpromising. Majoritarian rule now will not elect state or local officials who will maximize the rights of those subject to racial discrimination.[792] It is only the court decree that will cause local officials to marshal the resources needed to reform institutional discrimination. Yet, such a decree by its very nature will restructure political institutions, thereby diluting representative democracy.

Because it is unlikely that all of the three rules can be completely fulfilled simultaneously, the court must choose whether (1) to place total or greater weight on rules one and two while deemphasizing or ignoring rule three, (2) to stress local concerns that are apt to diminish or delay the effectuation of rights that should be redressed under rules one and two, or (3) to balance the victims' rights to be brought to the position they would have occupied absent the constitutional violation against the needs of local governments to manage their affairs without intrusive judicial intervention over prolonged periods of time. Although the courts have generally chosen to take the first approach, the third course of action comports with *Milliken II*'s three-rule test.

The court must weigh how heavily the proposed remedy will intrude upon local and state managerial and governance prerogatives. The inclusion of rule three means that the federal judiciary, acting in a counter-majoritarian capacity, must exercise some restraint upon how it imposes its will upon local officials.[793] Adjudication in structural reform cases involves policy making, and a mindful judge ensures that the remedial process includes an exchange of conflicting views and interests.[794] The issue becomes one of finding the point at which the federal judiciary oversteps the inherent limitations upon its powers to root out the constitutional violations by preempting state and local democratic processes that have allocated scarce public resources.[795] While the Supreme Court admits that limits exist upon its remedial powers, its rulings fail to clarify the permissible degree of judicial micro-management allowed to remedy a constitutional

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[792] *See* JACOBS, *supra* note 39, at 57–59, 81–82; WELLS & CRAIN, *supra* note 37, at 336–37.

[793] For a discussion of the counter-majoritarian difficulty, see BICKEL, *supra* note 515, at 16–23; DAHL, *supra* note 515, at 187–99; ELY, *supra* note 14, at 44–48. *See generally* Barry Friedman, *supra* note 515. Professor Friedman argues that "our idealized notion of countermajoritarian courts must give way to a vision of courts as bodies different from, but nonetheless responsive to, popular will." Friedman, *supra* note 1, at 738. He states that "majoritarian participation in defining rights through a reaction to judicial remedies and enforcement seems both inevitable and appropriate." *Id.* at 777.

[794] *See* Diver, *supra* note 4, at 45–47 (viewing the role of the judge in institutional reform litigation as a political powerbroker who should facilitate the court's policy making role through a bargaining process involving the accommodation of conflicting interests).

[795] *See* Frug, *supra* note 364, at 740 (pointing out the Constitution's provisions that emphasize the importance of democratic controls at the federal level to raise and allocate money).

violation.[796]

In an era in which school desegregation remedies frequently require millions of dollars to implement, *Milliken II*'s third rule remains elusive unless monetary impacts are treated as part of the state and local interests that must be considered by the court in devising its remedial decree.[797] This rule's mandate to take into account the interests of state and local authorities to manage their own affairs must be done "consistent with the Constitution."[798] Nevertheless, this narrowly cast rule clearly encompasses state and local interests in the level of funding that a court orders to desegregate public schools because court-ordered funding removes local discretion in the allocation of scarce fiscal resources.[799]

The federal judiciary should place more focus on evaluating the likely effectiveness of a proposed remedial plan.[800] School desegregation remedial plans require local cooperation to be effectual.[801] The elimination of long-standing racial discriminatory practices materializes more quickly when local leadership supports the enforcement of a court decree to remedy discriminatory conduct.[802] The most viable remedial plans involve balancing both individual and collective interests because consideration of community interests and resources

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[796] An Eighth Circuit Court of Appeals decision indicates awareness of constitutional limitations upon the judiciary's remedial powers. In *Jenkins v. Missouri* (*Jenkins II*), the Eighth Circuit rejected the district court's income tax surcharge as beyond the reach of judicial power because it introduced a new form of taxation to finance a public school system, and, as such, restructured the "State's scheme of school financing." 855 F.2d 1295, 1315 (8th Cir. 1988). *Milliken II*'s three-part test is viewed as allowing "courts to do pretty much what they want." Friedman, *supra* note 1, at 747.

[797] *See* Frug, *supra* note 364, at 773 (arguing that the Supreme Court should address "the importance of limiting judicial impact on the public purse in the delineation of appropriate judicial remedies for constitutional violations").

[798] Milliken v. Bradley (Milliken II), 433 U.S. 267, 280–81 (1977). It is not clear what the Court intended by the inclusion of this phrase.

[799] *See* Alden v. Maine, 119 S. Ct. 2240, 2264–65 (1999).

[800] Once a plan goes into effect, it cannot be altered easily because those affected by the plan resist change once a consensus has been reached. *See* Fishman & Strauss, *supra* note 55, at 223. A school system may face political opposition to an amended plan and most often will prefer the status quo. *See id.*

[801] *See* Diaz v. San Jose Unified Sch. Dist., 633 F. Supp. 808, 827 (N.D. Cal. 1985) (recognizing that the success of a desegregation plan depends upon parents and students as well as school authorities and community commitment to improve the quality of education); TAYLOR, *supra* note 50, at 8 (pointing out that remedial desegregation in Buffalo in comparison to Boston proceeded more peacefully and with better results, because the Buffalo Board of Education, unlike Boston's School Committee, cooperated with the district court).

[802] *See* JACOBS, *supra* note 39, at 82; Friedman, *supra* note 1, at 768 (finding that, in devising remedies, courts defer to the interests of governmental bodies that have violated rights and negotiate with these bodies in the enforcement of them); *see also supra* notes 216–18 and accompanying text.

enhances the community's capability to remove the constitutional violations.[803]

C. *Unconstitutional Prison Conditions Remedied by Interest Balancing*

The federal judiciary's remedial approach to correct unconstitutional prison conditions includes the same kind of interest balancing advocated here to guide the imposition of fiscal remedies in institutional reform litigation. In recent years, numerous lawsuits have been instituted to remedy prison conditions alleged to violate the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment. Although some federal courts overlook *Milliken II*'s interest balancing approach as a guide to implement school desegregation remedies, they frequently refer to interest balancing as part of their decision-making processes to correct unconstitutional prison conditions.[804] The Supreme Court recently

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[803] Judges surveyed by the Institute of Judicial Administration reported that insufficient funds for the improvement of educational programs constituted a major limitation upon the ability to achieve complete success in the implementation of school desegregation programs. *See* Flicker, *supra* note 215, at 366. Other impediments included white flight, segregated housing, and zoning patterns. *See id.*

[804] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 558–60 (1979) (upholding visual cavity searches of prison inmates after contact visits with a person from the outside because reasonableness under the Fourth Amendment cannot be precisely defined, thereby requiring a balancing of legitimate prison security needs against privacy interests of inmates); Toussaint v. McCarthy, 801 F.2d 1080, 1087, 1114 (9th Cir. 1986) (upholding the district court's order for prison expenditures to reduce noise and to provide adjustable hot and cold running water controls and citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), for the proposition that the "task is to correct, by a balancing of the interests, the condition that offends the constitution"); Newman v. State, 683 F.2d 1312, 1321 (11th Cir. 1982) (overruling district court order to release prisoners to reduce overcrowding and stating that "[t]he consent decree appears to represent the proper balance between the duty of the district court to remedy constitutional violations and the right of the State to administer its prison and parole systems"); Hoptowit v. Ray, 682 F.2d 1237, 1266 (9th Cir. 1982) (Tang, J., concurring) (opining that federal courts, in shaping orders affecting state and local governments, must consider the three rules set forth in *Milliken II*'s three-rule test and that the third rule of taking into account state and local interests in managing their own affairs is particularly relevant in curing constitutional violations in prisons); Ramey v. Hawk, 730 F. Supp. 1366, 1371 (E.D.N.C. 1989) (upholding urine testing of prisoners to deter drug use because the government has a legitimate reason for the policy, which struck a "reasonable balance between protecting the prisoners' constitutional rights and enabling prison administration to safely and efficiently carry on the task of running the penal institution within the confines of available time and resources"); Alberti v. Klevenhagen, 606 F. Supp. 478, 487 (S.D. Tex. 1985) (applying an interest balancing test to determine whether the court should grant a stay to its order to hire additional county jail guards to correct constitutional deficiencies and stating that after "balancing the equities in this case—irreparable harm to the defendants, substantial injury to the plaintiffs, and the public interest," the harm caused by higher taxes to fund the remedy did not outweigh defendants' bad faith in failing to implement court orders).

affirmed, in *Rufo v. Inmates of Suffolk County Jail*,[805] the role that interest balancing should play in the judicial review of proposed consent decree modifications designed to correct Eighth Amendment violations.[806] The Court opined that the district court could appropriately consider fiscal constraints in tailoring consent decree modifications in institutional reform litigation.[807]

VII. ANALYSIS OF THE FEDERAL JUDICIARY'S REMEDIAL TAXATION PRINCIPLES

This Part critiques the various principles established by the federal judiciary for determining the conditions upon which judicial taxation may be ordered to correct constitutional violations. This Article argues that the constitutional limitations explored in Part V make doubtful the constitutionality of any remedial judicial taxation imposed in the course of institutional reform litigation. Should the Court continue to uphold judicial taxation, however, clearer standards for its imposition need to evolve. Part VIII proposes a set of more definitive guidelines after exploring a number of alternative standards.

A. *Summary of Judicial Principles*

The federal judiciary responded in a variety of ways, as shown in Part II, to the issue of court-ordered taxation to fund a school desegregation remedy. This Part analyzes the following principles articulated in these rulings:

(1) The legislative solution to funding the desegregation remedies should be received with a presumption of regularity.[808]

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[805] 502 U.S. 367 (1992).

[806] *See id.* at 392–93. In *Rufo*, a district court had refused to grant a county sheriff's request to modify a consent decree to permit double bunking in some cells in view of an increased number of pretrial detainees. *See id.* at 367. The Court admonished lower federal courts that they could best effectuate the public interest by taking a flexible approach to consent decree modification and implementation because institutional reform litigation decrees directly affect the operation of public institutions as well as the parties bound by them. *See id.* at 381.

Interest balancing is also used to determine whether state and local governments have encroached upon First Amendment rights. In *Elrod v. Burns*, 427 U.S. 347, 363 (1976), Justice Brennan, writing for the plurality, opined that the benefits gained by restricting First Amendment rights must outweigh the loss of these constitutionally protected rights.

[807] *See Rufo*, 502 U.S. at 370. The Court found that a sheriff's request to modify a consent decree to allow double bunking in some jail cells under construction should be considered because "the public interest and considerations of comity require that the district court defer to local government administrators to resolve the intricacies of implementing a modification." *Id.*

[808] *See* United States v. Board of Sch. Comm'rs, 677 F.2d 1185, 1190 (7th Cir. 1982) (stating that "[i]t is not the province of a federal court to instruct the legislature on how it should finance its obligations"); United States v. Missouri, 515 F.2d 1365, 1373 (8th Cir. 1975). *But*

(2) "[I]nsofar as practical a court should exercise its discretion in accordance with State law, always remaining mindful that the beleaguered taxpayer ought not to incur a tax increase beyond that absolutely essential for effective reorganization."[809]

(3) If the legislature refuses to act to establish taxation policy, the court can "fill the . . . void."[810]

(4) A district court must defer to the political funding process before it may require an increased tax levy, and such orders may be imposed only when "necessary to remedy a violation of the Constitution, and only after exhausting all other [remedies]."[811]

(5) A district court may order an increase in taxes, but only after it has made a finding that no other alternatives are available or sufficient to finance its desegregation order.[812]

(6) "[A]s a prerequisite to considering a taxation order," a finding must be made "that any remedy less costly than the one at issue would so plainly leave the violation unremedied that its implementation would itself be an abuse of discretion."[813]

B. *Judicial Deference to the Established Tax Rate*

In *United States v. Missouri*, a court-ordered desegregation plan called for the consolidation of three school districts to desegregate one of the districts and the establishment of a new uniform tax rate throughout the consolidated district to fund the remedial plan.[814] The Eighth Circuit Court of Appeals ruled that

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see Evans v. Buchanan, 582 F.2d 750, 775 (3d Cir. 1978) (permitting the legislature to provide a statutory procedure for devising a tax rate to fund a desegregation plan because state political processes are preferred over federal court intervention, but not according presumptive regularity to any legislative lowering of the tax rate).

[809] Evans v. Buchanan, 447 F. Supp. 982, 1029 (D. Del. 1978).

[810] *Id.* at 1035.

[811] *See* Liddell v. Missouri (Liddell VII), 731 F.2d 1294, 1321 (8th Cir. 1984).

[812] *See id.* at 1323. This standard was approved in *Missouri v. Jenkins*, 495 U.S. 33, 51–52 (1990) (finding that the district court improperly ordered a tax increase because it failed to avail itself of a permissible alternative: "[I]t could have authorized or required KCMSD to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented KCMSD from exercising this power.").

[813] *Jenkins*, 495 U.S. at 79 (Kennedy, J., concurring). This test is similar to the one articulated by the district court in *Evans v. Buchanan*, 447 F. Supp. 982, 1025 (D. Del. 1978). In *Evans*, the court stated that "[a]uthorization to set a school tax rate is properly a product of the political process. For that reason, . . . a federal court should not become involved failing a total abdication of responsibility over a period of time such that further delay significantly jeopardizes constitutional rights." *Id.* at 1025.

[814] *See* 515 F.2d 1365, 1366–68 (8th Cir. 1975). For a discussion of *Missouri*, see *supra* notes 240–44 and accompanying text.

deference should be given to the tax rate set by state and local decision makers to cover the new district's operations.[815] Likewise, in *Evans v. Buchanan*, the Third Circuit Court of Appeals ruled that the district court should grant the same presumptive validity to the legislature's taxation framework that it accorded other legislative acts.[816] The district court, however, opined that the scope of judicial review could exceed the rational basis test in ascertaining whether the tax rate "so strip[ped] the [county school district] of financial support that the unconstitutional intent to thwart desegregation decrees may be inferred as a matter of law."[817]

Strong policy reasons support the judiciary's grant of presumptive validity to the governing taxation legislation and taxation rate when the district court implements school desegregation remedies. The legislature should not be presumed to frustrate a desegregation plan, and should the legislature use its taxation powers to do so, the presumptive validity accorded taxation policy can be rebutted easily. Such judicial deference concedes that the power to make taxation decisions rests with the legislative body and treats the subject of taxation as comparable to other legislative decisions that traditionally are accorded deference. Courts consistently recognize taxation as among the most sensitive areas of state governmental operations and one in which the judiciary should intrude only with trepidation.[818] Further, the judiciary should not establish a regimen of different degrees of legislative deference depending upon the remedial action under consideration. Such a scale would not only complicate judicial review, but it would eviscerate the notion that all violations of constitutional rights must be vindicated.

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[815] *See Missouri*, 515 F.2d at 1373.

[816] *See* 582 F.2d 750, 779 (3d Cir. 1978). For a discussion of *Evans*, see *supra* notes 245–67 and accompanying text.

[817] Evans v. Buchanan, 468 F. Supp. 944, 951 (D. Del. 1979).

[818] *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 110 (1981) (barring on comity grounds state taxpayers' action challenging the state's administration of taxation because the federal judiciary must recognize a state's need to administer its fiscal operations); Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655, 660–61 (1874) (upholding district court's refusal to assess and collect taxes to fund delinquent bonds issued by board of levee commissioners because the exercise of such power would constitute an invasion by the judiciary of the state's legislative powers). In *Heine* the Court stated that the remedial taxation requested "must be derived from the legislature of the State" as it is not an inherent judicial power. *Id.* at 661; *see also* Kelley v. Metropolitan County Bd. of Educ., 836 F.2d 986, 997 (6th Cir. 1987) (reversing district court order for state assumption of local school board's desegregation costs and declaring that few, if any areas, of the states' guaranteed republican government are more important than finance and taxation); Rhem v. Malcolm, 507 F.2d 333, 341 (2d Cir. 1974) (rejecting judicial taxation to fund a new jail to replace a male detention center, the operation of which violated prisoners' due process rights);THE FEDERALIST NO. 35, at 216–17 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the exercise of taxation powers requires "extensive information and a thorough knowledge of the principles of political economy"); THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating the belief that the judiciary would not exercise the power of the purse).

C. *The No Alternative Test*

In *Liddell VII*, the Eighth Circuit Court of Appeals held that the judiciary possessed the power to order taxation in excess of that authorized under state law to remedy segregation.[819] The court opined, however, that "[l]imitations on this power require that it be exercised only after exploration of every other fiscal alternative."[820] A district court finding as to the nonexistence or insufficiency of other revenue sources constituted a prerequisite to a taxation order contrary to state law.[821]

The Supreme Court's application of the no alternative test[822] in *Jenkins* demonstrates its unworkability. If a federal court wants to strike down a judicially imposed tax, it can almost always find the availability of an alternative course of action. The alternative considered viable by the Supreme Court in *Jenkins* consisted of taxation directly imposed by local authorities rather than by the district court itself. Nevertheless, this option entailed the same result as the district court's remedial order: judicially ordered and authorized taxation.[823] Both alternatives resulted in the same impact upon taxpayers. The Court's preferable alternative boiled down to nothing more than a procedural difference in the imposition of the tax.[824]

Jenkins equally demonstrates how easily a court, while ostensibly following

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[819] *See* Liddell v. Missouri (Liddell VII), 731 F.2d 1294, 1320 (8th Cir. 1984).

[820] *Id.*

[821] *See id.* at 1323. The *Liddell VIII* decision also phrased this test as one that should be operative only after all other remedies were exhausted. *See* Liddell v. Board of Educ. (Liddell VIII), 758 F.2d 290, 300–01(8th Cir. 1985).

[822] The "no alternative test" originated in *Liddell VII*, 731 F.2d at 1320. *See supra* notes 274–78 and accompanying text. In *Missouri v. Jenkins*, the Court applied a "no alternative test" in reviewing the district court's taxation order that disregarded state law. The Court ruled that the test was not satisfied because the district court alternatively could authorize and direct the Kansas City, Missouri School District to levy property taxes in an amount sufficient to fund the desegregation remedy. *See* 495 U.S. 33, 51 (1990).

[823] *See supra* notes 333–34.

[824] Finding an alternative to remedial taxation should mean finding a less intrusive remedy than taxation. In *Jenkins*, taxation imposed by the KCMSD was viewed as meeting the "no alternative test" because it was less intrusive than taxation directly imposed by the Court. *See Jenkins*, 495 U.S. at 51.

The "no alternative test" can be analogized to the Court's application of the strict scrutiny test. Under the strict scrutiny test, a classification can be upheld only if another branch of government can show a close relationship between the classification and the promotion of a compelling governmental interest. If the judiciary finds that a classification is not needed to achieve an overriding governmental interest, the law will be invalid under the Equal Protection Clause. Likewise, if alternatives, other than judicially ordered taxation, can be employed to remedy a constitutional violation, the "no alternative test" has not been satisfied. The "no alternative test" should prove as difficult to apply as the strict scrutiny standard of judicial review.

the no alternative test, can impose taxation even when alternative courses of action or financing exist to avert the remedial taxation. The Court rejected the State's argument that the lower federal courts, upon finding the State and the KCMSD jointly and severally liable, should have turned to state-financed desegregation remedies rather than rely upon court-ordered local taxation that violated state law.[825] State funding clearly existed as an alternative to court-ordered taxation to satisfy the KCMSD's share of remedial costs. The Court's rejection of this alternative seemed to emanate from a desire to uphold remedies approved by lower courts. Otherwise, the remedial process could be delayed until alternative remedial orders were implemented.

According to the *Jenkins* Court, if a rational reason exists for a district court's choice of remedies, appellate courts should uphold the lower court's remedial action.[826] The Court stated that the state's earlier resistance to assume the remedial plan's costs supported the district court's decision to dismiss state alternative financing.[827] Further, the district court tailored its remedial actions in response to the Eighth Circuit's ruling that rejected placing three-fourths of the remedial funding upon the state.[828] The Court thus indicated that the federal courts possess the power to set aside state tax law limitations upon a school district's power of taxation when another joint constitutional violator could be required to fund the desegregation remedies without displacing state law.[829]

The no alternative test appears to impose rigorous conditions precedent to judicial taxation so as to make its application narrow in scope. In practice, however, the test provides plenty of room for an expansion of judicially mandated taxation. First, the test operates when the court deems that the existing taxation framework will produce insufficient, as opposed to nonexistent, revenues to carry out the desegregation plan. The court thus determines the level of taxation it deems desirable rather than giving deference to the amount of taxation that can be levied under existing state statutory law. The use of this test will continue to involve the federal judiciary in day-to-day judgment calls as to the amount of desirable funding to carry out a desegregation plan. The test permits judicial taxation when the level of taxation does not meet the court's expectations.

Second, the test does not provide guidance as to the alternatives that must be

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825 *See Jenkins*, 495 U.S. at 53–54.

826 *See id.* at 54.

827 *See id.*

828 *See Jenkins*, 495 U.S. at 54.

829 *See id.* at 53–54. The Supreme Court referred to its statement in *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 291 (1976), that the enforcement of a money judgment would not violate principles of federalism, but that an attempt to restructure local governmental units would violate such federalism principles. *See Jenkins*, 495 U.S. at 54. The Court stated: "But we did not there state [*Milliken II*] that a district court could never set aside state laws preventing local governments from raising funds sufficient to satisfy their constitutional obligations just because those funds could also be obtained from the States." *Id.* at 54.

tried before the court can declare the exhaustion of all available alternatives. Uncertainty remains as to the extent of a school district's obligation to search for alternative funding sources. For example, must the school district appeal to the state legislature to authorize new funding sources to satisfy the no alternative test? Or, alternatively, could the court rule as to the non-necessity for such appeals because the school district should only have to search for remedies provided by the existing taxation framework?

The no alternative test, as well as the other taxation principles outlined, fail to guide the district court, at the time it initiates a remedial school desegregation plan, as to the degree of its power to mandate new or additional sources of revenue. A district court that designs a plan without giving consideration to the existing levels of available funding and taxation may take a rights maximizing posture. When the level of taxation proves inadequate to implement the remedial plan fully, the court will appear powerless unless it enforces its decree. To avoid a retreat from its desegregation plan, the court may opt for mandated taxation. Changing a plan when it is well under way will delay the remedial process and frequently will be met with resistance.[830] The district court should plan its funding mechanisms at the same time that it undertakes to design a desegregation plan.

The no alternative test proves difficult to apply as Little Rock, Arkansas school desegregation litigation demonstrated. During the course of litigation, a district court and the Eighth Circuit Court of Appeals reached different conclusions as to the propriety of a judicial order to raise school revenues by extending school district millages[831] due to expire without voter approval.[832] The Arkansas Constitution required voter approval of such millages after the measures were placed on the ballot.[833] The district court viewed an order to extend such

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[830] Once a consensus on a plan is achieved, it develops a momentum of its own that limits the court's ability to amend it. *See* Fishman & Strauss, *supra* note 55, at 223. The parties affected by a desegregation plan who have relied upon it frequently oppose alterations to it. *See id.* School officials will be reluctant to amend a plan if hostile reaction is anticipated to the proposed changes. *See id.*

[831] The district court explained the extension of millages, derived from the word "mills" used in determining the amount of tax, as the imposition of a tax that would not exist without the extension. *See* Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F. Supp. 1013, 1016 (E.D. Ark. 1991), *rev'd on other grounds*, 971 F.2d 160 (8th Cir. 1992). The district court stated that the extension made "permanent what was voted as a temporary tax for a specific purpose." *Id.* at 1016.

[832] *Compare Little Rock*, 778 F. Supp. at 1017–18 (finding that extending the millages would constitute a tax prohibited by *Missouri v. Jenkins* because Arkansas school districts, unlike the KCMSD in *Jenkins*, did not possess any power to tax without voter approval of the millages), *with* Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 971 F.2d 160, 164–65 (8th Cir. 1992) (extending the millages permitted under the law-of-the-case doctrine because the extensions had been ordered previously).

[833] *See* ARK. CONST. art. XIV, § 3. Under the Arkansas Constitution, school districts are

millages as constituting judicial taxation because local school districts lacked power to extend such millages without a vote of the people.[834] Applying the no alternative test, the district court concluded that a judicial order to extend millages without a vote had to be preceded by *Liddell VII*'s required factual finding that "all other fiscal alternatives [are] unavailable or insufficient."[835] The district court interpreted *Jenkins* and *Liddell* to authorize judicial taxation only as a last resort following a judicial determination that "no alternative remedial plan . . . would address the constitutional violations without causing a funding crisis."[836] The district court believed that "more than just *funding* alternatives must be considered."[837]

The Eighth Circuit reversed the district court's decision, holding that because it had directed the district court to approve a settlement agreement that included court-ordered extensions of the millages, those extensions were settled as the "law of the case."[838] The "law-of-the-case" doctrine bars reopening and re-litigating the same issue in the same case by making the ruling of the highest court the law of the case.[839] The Eighth Circuit added, however, that in view of the costly school desegregation plan, the millages at issue could not be omitted without sacrificing the school districts' ability to achieve unitary status.[840] It did not accept the district court's "suggestion that a remedy can be so limited once this court has found it to be constitutional."[841] Instead, as this statement suggests, the appellate court implicitly rejected the district court's application of the no alternative test.

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authorized to levy an annual tax for the maintenance of schools, the erection and equipment of school buildings, and the retirement of existing indebtedness if a majority of the qualified voters in the school district voting in the election approve the rate of tax so proposed. *See id.* If a majority of taxpayers disapprove the proposed rate of taxation, then the tax shall be collected at the rate approved in the last preceding annual school election. *See id.*; *Little Rock*, 971 F.2d at 163 n.1.

[834] *See Little Rock*, 778 F. Supp. at 1018.

[835] *Id.* at 1017 (quoting Liddell v. Missouri (Liddell VII), 731 F.2d 1294, 1323 (8th Cir. 1984)). The district court found that no such factual finding had been made. *See id.* The district court further found that it lacked power to extend the millages because under the Supreme Court's holding in *Jenkins*, a district court can order a local government to raise taxes only if the local government has some power to tax. *See id.* at 1018. The court opined that "for the reasons so eloquently stated by the concurring Justices in *Jenkins* . . . a district court does not have the power under Article III of the Constitution to impose or increase taxes, either directly or through delegation to a local government body." *Id.*

[836] *Id.* at 1019.

[837] *Little Rock Sch. Dist.*, 778 F. Supp. at 1019 (emphasis in the original).

[838] *See* Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 971 F.2d 160, 165 (8th Cir. 1992).

[839] *See id.*

[840] *See id.*

[841] *Id.*

D. *The Last Resort Test*

Justice Kennedy, in his concurring opinion in *Missouri v. Jenkins*, wrote that "as a prerequisite to considering a taxation order, I would require a finding that that [sic] any remedy less costly than the one at issue would so plainly leave the violation unremedied that its implementation would itself be an abuse of discretion."[842] This statement echoes the *Griffin* court's holding: judicial taxation becomes permissible only when the lack of taxation creates a palpable injustice.[843] Judicial taxation cannot be imposed under the last resort test if room for disagreement exists as to the amount of revenue needed to correct the judicial violation. When the lack of tax revenue clearly leaves constitutional violations blatantly remediless, however, judicial taxation may be ordered.[844]

1. *Advantages of the Last Resort Test*

The last resort test achieves greater predictability and certainty in application than the no alternative test because it more narrowly defines the scope of judicial power that can be exercised to order taxation. The last resort test's guidelines present greater clarity than those of the no alternative test because the court must only make one determination: whether the lack of taxation creates an abuse of discretion; no assessment of possible alternatives to correct the violation is regarded. Further, the test supports federalism principles by requiring the judiciary to focus on remedial action costs. A taxation order cannot emanate unless existing taxes plainly leave the violation unremedied. Rather than placing the judiciary in the position of finding alternative remedial routes that may or may not exist within the existing local governmental structure, the test forces the judiciary to work within that structure unless it is so deficient as to cause an abuse of discretion.

2. *Disadvantages of the Last Resort Test*

The last resort test must be more clearly defined to become practicable. Upholding taxation in the vague "abuse of discretion" area will most likely produce divergent decisions. The test requires district court judges to determine the point at which the implementation of a remedial plan using available monetary resources leaves the constitutional violation so plainly unremedied as to constitute an abuse of discretion. Obviously, district court judges may possess different notions of what magnitude of remedies will correct a constitutional

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[842] Missouri v. Jenkins, 495 U.S. 33, 79 (1990) (Kennedy, J., concurring).

[843] *See* Griffin v. County Sch. Bd., 377 U.S. 218, 232–33 (1964); *supra* notes 239, 363 and accompanying text.

[844] *See supra* notes 239, 264–67, 363 and accompanying text.

violation so as to avoid implementing a remedial course of action that constitutes an abuse of discretion. Further, the judiciary may view the degree of financing needed to correct these violations differently than the citizenry. Additional guidelines would be helpful to obtain greater uniformity and certainty in this difficult area of devising adequate monetary relief.

The last resort test is flawed also by its failure to address the issue of whether the federal judiciary may impose taxation unauthorized by state law.[845] Because the test does not impose state law authorization as a prerequisite for judicially mandated taxation to correct an "abuse of discretion,"[846] it must be presumed that such taxation could be imposed absent such authorization. It is entirely possible that a district court could find the existing level of state authorized financing deficient enough to categorize the remedial implementation plan as an abuse of discretion. Yet, Justice Kennedy, concurring in *Jenkins*, concluded that the federal district court lacked the power to order taxation unauthorized by state law because the federal judiciary does not possess independent taxation powers.[847] Justice Kennedy counseled restraint from the exercise of judicial taxation given the deep intrusion into state and local political processes that such taxation always entails.[848]

E. *Balancing Test*

1. *Application of the Balancing Test*

In *Jenkins II*, the Eighth Circuit Court of Appeals applied a balancing test to determine the validity of two different taxes imposed by the district court for remedial purposes. The appellate court held that a court-ordered income tax surcharge, for which no state law authority existed, invaded the province of the legislature and exceeded the power of the district court.[849] In the same opinion, however, it upheld a court-ordered property tax increase, also unauthorized by state law, as a less obtrusive method to rectify constitutional violations.[850] The court weighed the necessity for judicial taxation against the degree of intrusiveness involved in imposing the remedy upon state and local processes.

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[845] *See Jenkins*, 495 U.S. at 74–75 (Kennedy, J., concurring).

[846] Justice Kennedy phrased the last resort test as follows: "[A]s a prerequisite to considering a taxation order, I would require a finding that that [sic] any remedy less costly than the one at issue would so plainly leave the violation unremedied that its implementation would itself be an abuse of discretion." *Id.* at 79.

[847] *See id.* at 74–75.

[848] *See id.* at 75 (Kennedy, J., concurring).

[849] *See* Jenkins v. Missouri (Jenkins II), 855 F.2d 1295, 1315–16 (8th Cir. 1988).

[850] *See id.* at 1312–16. In *Jenkins II*, the Eighth Circuit Court of Appeals endorsed *Milliken II*'s three-part test and stressed the importance of balancing collective interests against rights maximizing interests. *See id.* at 1299.

The Eighth Circuit found that the property taxation needed to fund the desegregation remedy for the Kansas City Missouri School District had been greatly restricted by levy reductions mandated by Proposition C.[851] Upon weighing these monetary needs against the intrusiveness of the remedy, it decided that setting aside these levy reductions would not inappropriately disrupt state and local governmental procedures.[852] On the other hand, the Eighth Circuit found that the imposition of an income tax surcharge, by restructuring Missouri's school financing scheme, did not defer appropriately enough to the existing state and local taxation framework.[853]

Evans v. Buchanan's principles of remedial taxation also employ a balancing test[854] because they provide that "*insofar as practicable*, a court should exercise its [remedial] discretion in accordance with State law. . . ."[855] Counterbalancing the desire to follow state law, the court cautioned that "[i]f the legislature refuses to act to establish taxation policy, the court can fill the legislative void."[856] The court's admonition that the judiciary should "always [remain] mindful that the beleaguered taxpayer ought not to incur a tax increase beyond that absolutely essential for effective reorganization" further affirms the promulgation of a balancing test.[857] Should the *Jenkins II* and *Evans* precedents be expanded, the judiciary will need to articulate more clearly the factors to be considered and weighed in its policy analysis.

The application of a balancing test involves weighing the extent of the harm caused by the proposed judicially ordered taxation against the benefits derived from the additional revenues obtained by the judicial taxation. Harms caused by judicial taxation include the relaxation or possible disregard of comity and federalism principles. More specifically, remedial taxation may result in judicial displacement of the existing tax structure, loss of representative government, and invalidation of neutral, validly enacted state and local laws. The potential

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851 *See Jenkins II*, 855 F.2d at 1312 (citing MO. REV. STAT. § 164.013 (Supp. 1987)).

852 *See Jenkins II*, 855 F.2d at 1314.

853 *See id.* at 1315. In weighing the intrusiveness of the ordered taxation, the court imposed a "goes too far" balancing test comparable to the test set in motion by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), to determine when an unconstitutional taking has occurred. The income tax surcharge went too far in invading state and local processes whereas the additional property taxation in *Jenkins* "merely remov[ed] the levy limitation on an existing state or local taxing authority." *Jenkins*, 855 F.2d at 1315.

854 *See* San Francisco NAACP v. San Francisco Unified Sch. Dist., 695 F. Supp. 1033, 1043 (N.D. Cal. 1988) (opining that "[i]n *Evans*, the Third Circuit balanced the duty of a federal court to ensure that its remedial decrees are carried out against the right of elected legislators to set the specific tax rates necessary to raise money").

855 Evans v. Buchanan, 447 F. Supp. 982, 1029 (D. Del. 1978), *aff'd*, Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978) (emphasis added).

856 *Id.* at 1035.

857 *Id.* at 1029.

weakening of judicial capital caused by public disenchantment with an activist judiciary performing legislative functions forms another negative factor for the district court to evaluate in applying a balancing test. Benefits to be derived from judicially ordered taxation include the degree to which the production of additional revenues restores the victims of constitutional violations to the position they would have held absent such violations. The ability to correct the constitutional violations with tax dollars produces the greatest benefit, but this accomplishment must be weighed against an assessment of the intrusiveness of the remedy.

2. *Advantages of the Balancing Test*

The application of a balancing test causes the judiciary to evaluate both the benefits and the harms that stem from a decree ordering judicial taxation. The court's policy analysis through the application of such a test is preferable to judicial reliance upon narrow rules that do not address the tensions between federalism principles and the need to remedy the constitutional violations. The singular focus of these restrictive rules on either the harms or benefits derived from judicial taxation forecloses a global review. A balancing test should include consideration of both the extent to which the violation can be remedied by the additional expenditure of public tax money and the concomitant harms from judicial oversight or displacement of state executive and legislative functions. The benefits of this test stem from its comprehensiveness in causing the judiciary to evaluate the effect of the remedy upon state and local interests as well as its efficacy in correcting the constitutional violations.

3. *Disadvantages of the Balancing Test*

The balancing test provides less guidance than *Liddell VII*'s no alternative test and Justice Kennedy's sanction of judicial taxation as a last resort to remedy an abuse of discretion that otherwise would occur by leaving the constitutional violations unremedied. Both the no alternative test and the last resort test narrow the circumstances under which judicial taxation can be invoked. A balancing test, however, can incorporate guidelines by articulating the factors to be balanced. Generally, the judiciary would weigh whether the contemplated taxation exceeded existing norms of judicial propriety by unduly disturbing the existing state and local governmental tax structure, or conversely, whether leaving the violation less than completely remedied would be deemed egregious. The application of a balancing test would seem to result in placing greater weight upon, rather than limiting, the imposition of judicial taxation because the federal judiciary repeatedly has stressed the necessity of using its remedial powers to

correct constitutional violations.[858]

VIII. PROPOSED STANDARDS TO GUIDE THE IMPOSITION OF JUDICIALLY MANDATED TAXATION

Given the Court's historic declarations that the judiciary lacks the power to tax, most federal courts will remain hesitant to consider remedial taxation.[859] Because the Court in *Jenkins* upheld, however, the power of a district court in the Eighth Circuit to order taxation to implement a school desegregation remedial plan, future courts may impose taxation when the costs of such a plan are not met. This Article proposes guidelines to minimize the possibility of judicial taxation, but acknowledges its possible occurrence should *Jenkins* remain in effect.

A. *Proposed Guidelines*

(1) At the earliest time possible, the district court should determine whether fiscal remedies will be needed to correct constitutional violations. If so, after examining the nature of the violations, the district court:

(a) should specify the governmental institutional deficiencies that need to be corrected so as to remedy the constitutional violations; and

(b) should defer to the existing tax rate and existing method of taxation to provide the remedial revenue needed.

(2) If the district court finds that deference to the existing tax rate and structure is plainly unworkable, it should make repeated attempts to involve the local taxing body and political community in providing new revenue sources or in re-allocating existing resources as necessary. Should cooperation fail, the district court should make findings that:

(a) describe the taxation deficiencies;

(b) determine the amount of additional remedial revenue plainly needed to remedy the constitutional violations; and

(c) ascertain alternative funding sources.

(3) Prior to ordering remedial taxation, the court should further find that:

(a) alternative funding sources have been sought and repeatedly denied; and

(b) the deficiencies of the existing tax rate and method of taxation cause the constitutional violations to be plainly remediless.

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[858] *See Jenkins II*, 855 F.2d at 1313 (citing North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("The Supreme Court has made it clear that state law limitations cannot hinder a district court from remedying constitutional violations."). *See supra* notes 86–94 and accompanying text.

[859] *See* La Pierre, *supra* note 1, at 376; *see also supra* note 229 and accompanying text.

(4) Should taxation be ordered, it must be a form of taxation for which state authorization exists.[860]

The standards require the district court to ascertain the funding needed to correct the constitutional violations at the earliest time possible. A demonstrated need for the fiscal remedies advances political accountability and makes judicial intervention more plausible.[861] This requirement should cause the court to be cognizant of the fiscal practicalities that will affect the remedial process. Further, it should deter the court from pursuing remedies that are fiscally unattainable. Remedial plans cannot be devised without adequately considering their financial implications. An early examination of the community's fiscal resource base should assist the court in tailoring remedies to redress the constitutional violations.

The standards next provide that the district court specify the institutional deficiencies that resulted in the constitutional violations. By delineating such deficiencies, the court points out the seriousness of the problem, making corrective action credible. Further, the standards require deference to the existing tax rate and funding mechanisms.[862] They contemplate that the district court will attempt to work within the state's existing fiscal framework to correct the constitutional violations. Existing precedent supports this deference.[863] In the sensitive and complex area of taxation, the judiciary should be deferential to judgments made by elected officials because they are more politically accountable than appointed federal judges.[864] Further, the standards reinforce the necessity for a court to work with state and local governmental officials to remedy the constitutional violations.[865] Judicially mandated fiscal remedies that ignore local

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[860] *See supra* notes 427–34, 766–74 and accompanying text; *infra* notes 876–80 and accompanying text (discussing why taxation should not be ordered unless authorized by state law).

[861] *See* Jackson, *supra* note 94, at 2241–42.

[862] *See* Jackson, *supra* note 94, at 2230 (recommending that the Court exercise a high degree of deference in reviewing Congress's actions that affect the states).

[863] *See supra* notes 814–17 and accompanying text.

[864] *See* Jackson, *supra* note 94, at 2230 ("A concern for political accountability both supports judicial review and cautions that it should be highly deferential to the judgments of the national legislature, which has a greater capacity than the federal courts to behave in a politically accountable way.").

[865] This requirement seeks to involve officeholders in the solution of suits instituted to increase minority share of limited state and local resources. *See* BICKEL, *supra* note 515, at 21 (noting the tendency of judicial review to weaken the democratic processes over time); MCGOWAN, *supra* note 85, at 82 (noting the citizenry's desire to seek immediate relief from the judiciary rather than to achieve reform with less speed and efficacy through direct political action); Diver, *supra* note 4, at 90 (finding that institutional reform cannot proceed without the "participation of those whose behavior must be altered"); Jackson, *supra* note 94, at 2228 (pointing out that federalism is quintessentially political in nature and that workability is its

conditions or bypass elected officials rarely succeed.[866]

Should the district court find that its remedial approaches cannot be implemented under the existing tax structure, it must make detailed findings as to the taxation and revenue inadequacies and search for alternative funding sources. These requirements are comparable to the "plain statement" rule that requires Congress to indicate clearly when it intends to preempt the states from exercising power.[867] In a judicial context, it requires as a condition precedent to a judicial taxation order, (1) an explicit analysis of the deficiencies of the existing tax rate and method of taxation that cause the constitutional violations to be plainly remediless and (2) the exhaustion of all alternative remedies. Although this clear statement requirement restricts the remedial process, it does not rule out the possibility of judicial taxation. It is simply a tool that elevates consideration of federalism interests.[868]

Second, the standards call for a tighter nexus between the end, adequate financing to remove the constitutional violations, and the means to accomplish this goal. The judiciary should not resort to judicial taxation until it has taken the following action: (1) described the taxation deficiencies, (2) determined the revenue amount plainly needed to constitutionally correct readily perceived constitutional violations, and (3) ascertained alternative funding sources.[869] This process further protects federalism values by ensuring that the courts' intrusive remedial powers restricting state autonomy will not be exercised unless clearly

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core).

[866] *See supra* notes 213–18 and accompanying text.

[867] *See* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (refusing to apply federal employment mandates to state judges in the absence of statutory language making it clear Congress had intended the requirements to apply to the states); Lessig, *supra* note 368, at 207 ("It [the clear statement rule] simply requires that when regulating in an area of primarily intrastate economic activity, Congress make plain the economic effect that it estimates a statute will have on interstate commerce.").

[868] *See* Jackson, *supra* note 94, at 2240 (arguing that federalism concerns can be protected by a "process-based 'clear evidence/clear statement' model designed to require some evidence... that Congress acted reasonably in concluding that federal legislation was 'necessary and proper' to the exercise of one or more of its powers"); Lessig, *supra* note 368, at 207.

Requiring a plain statement rule causes the party subject to the rule (1) to provide evidence that it acted reasonably in concluding that certain actions were necessary and proper, (2) to be more thoughtful about the actions contemplated, and (3) to provide opportunities for the parties subject to the contemplated actions (here, state and local governmental officials) to make their case for alternative proposals. *See* Jackson, *supra* note 94, at 2240–41.

[869] Professor Vicki Jackson argues that federal courts should presume that congressional directives to state legislatures are not "Necessary and Proper" when a goal can be accomplished by other means. *See* Jackson, *supra* note 94, at 2253. This presumption is analogous to the Court's "no alternative" test in the area of judicially imposed taxation. Professor Jackson presents the presumption as a replacement to a bright line rule prohibiting legislative commandeering. *See id.*

necessary.[870] When the judiciary imposes obligations upon state and local governments that affect their fundamental governmental functions, such as taxation, it should make clear the substantive basis upon which the duties rest.[871]

Hopefully, the judiciary's coercive power to order taxation will be exercised rarely. The power conceivably may be needed, however, in situations where governmental entities withdraw fiscal resources needed to correct constitutional violations, which readily are viewed as egregious in nature. Here, the constitutional violations are plainly remediless.[872] The standards, however, do not support judicial taxation for which no underlying state authorization exists.[873] Judicially created state tax authorization thrusts the judiciary into a state law-making role not contemplated by the Constitution and further undermines the institutional independence of the states by replacing and performing their unique governmental functions. The Constitution's framework, the separation of powers doctrine,[874] the Guarantee Clause, as well as comity and federalism considerations, all explored in Part V of this Article, contemplate that the judiciary should restrain itself from exercising legislative powers.[875]

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[870] *See id.* at 2235–38 (arguing that the Necessary and Proper Clause provides a textual basis for judicial enforcement of limits upon Congress's exercise of its powers, supporting judicial examination of whether the means used to carry out Congress's enumerated powers are necessary and proper); Lessig, *supra* note 368, at 200–01 (arguing that a tighter fit between ends and means could be used to interpret the scope of the Necessary and Proper Clause, thereby limiting the scope of Congress's Commerce Clause power, but fearing that the Court would be unable to ascertain consistently the degree of tightness required).

[871] *See* Jackson, *supra* note 94, at 2252–53 (arguing that when a federal statute imposes duties on state governments in their "governmental capacities," a more substantive form of judicial review is warranted).

[872] *See id.* at 2254–55 (rejecting formalist rule making and arguing that federal commandeering of the states should be permissible if the need is sufficiently urgent).

[873] *See id.* at 2255 (pointing out the need to avoid undue federal interference with unique state governmental functions and arguing that federal regulation of the states can threaten the existence of the states as "independent sources and locations of government authority"). *But see* La Pierre, *supra* note 1, at 370–79 (finding an implied judicial power to order taxation unauthorized by state law).

[874] Numerous articles and books have been written about the separation of powers doctrine. *See generally* GWYN, *supra* note 612; Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Strauss, *supra* note 637, at 488.

[875] *See* GWYN, *supra* note 612, at 101, 103, 106 (stating that Montesquieu, who first popularly expounded the separation of legislative, executive, and judicial functions, viewed the judicial function as the most frightening governmental power); WOOD, *supra* note 7, at 152 (presenting Montesquieu's view of the necessity to separate judicial power from executive and legislative power). The function of the legislative power is to declare the general will by making laws whereas the judicial power decides criminal and civil cases. *See* GWYN, *supra* note 612, at 103, 110. The judicial function involves the power to apply both the statutes enacted by the

B. *No Judicial Taxation Without State Law Authorization*

1. *Policy Reasons for No Judicial Taxation Without State Law Authorization and for Judicial Deference to State Law Taxation Limits*

The Court should firmly establish again the rule that federalism postulates embedded in the Constitution bar court-ordered taxation when state law does not authorize such taxation by state and local entities. The Court repeatedly followed this rule prior to *Jenkins*.[876] True, adoption of this principle possibly could leave some constitutional violations remediless, thus limiting to some degree the federal

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legislature and constitutional law. *See id.* at 125.

While Hamilton argued that judicial review was compatible with the separation of powers doctrine, France at the time rejected judicial review as violating the doctrine. *See* Gwyn, *supra* note 614, at 65, 72; *see also* THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that "[t]he interpretation of the laws is the proper and peculiar province of the courts"); Anderson, *supra* note 518, at 147 (arguing that judicial review makes the judiciary, rather than the legislature, the paramount governmental body).

[876] *See, e.g.*, United States v. County of Macon, 99 U.S. 582, 591 (1878) (refusing to order tax levies in excess of the taxation authorized by state law to pay the principal of and interest on delinquent county bonds); Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655, 660–61 (1873) (refusing to use the Court's equitable powers to order taxation to provide a remedy for holders of delinquent bonds issued by local levee commissioners); Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 120–22 (1873) (refusing to satisfy city indebtedness by ordering remedial taxation in violation of a state law in existence when the debt was incurred); City of Galena v. Amy, 72 U.S. (5 Wall.) 705, 708–11 (1866) (ordering city to levy taxes authorized by law to pay debt service on the city's indebtedness, but declining to order remedies not authorized by law to provide sufficient funds for all creditors).

In *Meriwether v. Garrett*, 102 U.S. 472 (1880), the Court clearly held that the separation of powers doctrine bars the federal judiciary from ordering taxation not authorized by state law. The Court opined:

> So long as the law authorizing the tax continues in force, the courts may, by *mandamus*, compel the officers empowered to levy it or charged with its collection. to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one .... In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative.... It is the province of the courts to decide causes between parties, and, in so doing, to construe the Constitution and the statutes of the United States, and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration....

Id. at 515.

judiciary's remedial powers. The judiciary still preserves, however, its remedial power to order a state or local legislative body to provide a remedy. Furthermore, federal courts retain an array of very coercive powers to carry out school desegregation plans. A district court, for example, could order the closing of public schools unless the state legislature acted to correct constitutional violations, as the New Jersey Supreme Court did in *Robinson v. Cahill*.

Taxation, unauthorized by state law, but nonetheless ordered by the federal judiciary, presents more troubling constitutional issues than does court-ordered taxation of a state authorized form already imposed by state or local bodies. First, when a court creates the taxation mechanism, it intrudes far more deeply into a state's sphere of autonomy. Second, a court's willingness to legislate taxation at the state and local level undermines the legitimacy of local rules of law because judicial intervention demonstrates the deficiencies of the state's or locality's existing legal framework or legislative processes. Such judicial taxation expresses contempt for state and local voters who failed to provide the legislative authority that the judiciary finds lacking. Third, a judicial order directed at a local entity to levy taxes for which no state authority exists violates the venerated maxim that political subdivisions of a state can exercise only those powers that the state entrusts in them.[877] Ignoring the common law structural principles that govern the exercise of state and local power diminishes their viability, a serious problem that may not be obvious to scholars and jurists unfamiliar with the rudiments of state and local government law.[878] Further, judicial taxation of the kind upheld in *Jenkins*, applicable solely to the KCMSD, grants relief to the plaintiffs in one school district, but fails to address comparable taxation issues present in other school districts, thus creating unequal distinctions and privileges among local governmental units.

Judicial restraint from ordering unauthorized state and local taxation produces several benefits. First, it prevents the federal judiciary from placing itself in the position of a state legislative body that creates and enacts legislation. Any judicial attempt to order taxes unauthorized by law amounts to the creation of law—a legislative function. Judicial taxation not authorized by state law nullifies representative governmental action and imposes taxation without representation. Such taxation sharply departs from the Court's traditional posture that federalism and comity considerations bar it from interfering with a matter as sensitive and

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[877] *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 177–78 (1907) (upholding a state's absolute discretion to establish the number, nature, and duration of powers its municipal corporations may hold and considering this principle to be among the Court's settled doctrines "to be acted upon whenever they are applicable"); City of Cleveland v. United States, 111 F. 341, 343 (6th Cir. 1901) (holding that mandamus will not lie to compel a mayor and council to levy taxes not authorized by law to satisfy a judgment against the city for improvements made by the relator).

[878] *See supra* notes 431–34 and accompanying text.

complex as a state's taxation system.[879] By refusing to become enmeshed in the administration and creation of state tax revenue, the Court honors the principles of federalism, comity, and separation of powers, three strong underlying precepts of the constitutional framework.

This self-imposed limitation further preserves respect for the judiciary and promotes judicial independence by ensuring judicial restraint from the exercise of legislative power. The majority of state courts, when faced with the need to generate taxation revenues to correct state constitutional violations, adhere to this form of institutional control.[880] Third, by eschewing unauthorized remedial taxation, the judiciary must more actively seek the involvement of state and local officials in finding the revenue sources to fund the remedial plan. Courts should encourage local and state officials to initiate remedial action within their sphere of authority. When elected officials participate in devising remedial implementation plans, the citizenry's voice in their selection should ensure greater acceptance of the imposed remedies.

2. *Precedent Supports No Judicial Taxation Without State Law Authorization and Judicial Deference to State Law Taxation Limits*

Missouri v. Jenkins has become synonymous with court-ordered taxation, but its primary precedential impact lies not in an order to tax, but in an order to impose taxation unauthorized by state law. The taxation ordered in *Jenkins* exceeded the state constitution's taxation cap.[881] Although federal courts frequently state that their remedial powers are not limited by state law,[882] *Jenkins* remains unique among the school desegregation cases in upholding the district court's taxation order for which no underlying state authorization existed.[883]

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[879] *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 103, 105, 107, 115–17 (1981).

[880] *See supra* notes 488–90 and accompanying text.

[881] The district court ordered the KCMSD to increase its property tax levy from $2.05 to $4.00 per $100 of assessed valuation. *See* Jenkins v. Missouri, 672 F. Supp. 400, 412–13 (W.D. Mo. 1987). The Eighth Circuit Court of Appeals upheld this levy increase. *See* Jenkins v. Missouri (Jenkins II), 855 F.2d 1295, 1313 (8th Cir. 1988) (holding that state law limitations may be set aside to remedy constitutional violations). The tax levy violated provisions of the Missouri Constitution that require a two-thirds vote of the voters for a levy higher than $3.25 per $100 of assessed valuation. *See* MO. CONST. art. X, §§ 11 (a)-(c); *see also* Missouri v. Jenkins, 495 U.S. 33, 56–58 (1990) (upholding the power of federal courts to set aside state imposed limitations upon taxation).

[882] *See, e.g.*, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971); Griffin v. County Sch. Bd., 377 U.S. 218, 233 (1964); United States v. Yonkers Bd. of Educ., 902 F.2d 213, 219 (2d Cir. 1990); United States v. Missouri, 515 F.2d 1365, 1372 (8th Cir. 1975); Haney v. County Bd. of Educ., 429 F.2d 364, 368 (8th Cir. 1970).

[883] This Article takes the view that the KCMSD lacked state authorization to undertake the tax levy rollback in violation of Proposition C, first ordered by the district court, as well as

Courts often rephrase or repeat the broad language in *North Carolina State Board of Education v. Swann* endorsing the imposition of remedial measures in violation of state policy.[884] This reiteration gives the appearance of widespread support for such a proposition when in fact federal courts, with the exception of those in the Eighth Circuit, have been loath to override neutral state law limitations. Even the Eighth Circuit Court of Appeals vacates district court orders that violate state law while continuing to state in dicta that the federal judiciary possesses the power to set state laws aside.[885]

Although federal courts frequently cite the Eighth Circuit dicta in *Haney v. County Board of Education* to the effect that state law limitations place no restraint upon the federal judiciary's remedial powers,[886] an examination of the

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the later property tax levies, ordered by the district court without voter approval, that exceeded the tax levy limits established by the Missouri Constitution. *See supra* notes 298–302, 332–34, 427–30, 766–67, 881 and accompanying text; *see also* Warner, *supra* note 1, at 1026–27, for the novel argument that the majority opinion in *Jenkins* may be interpreted as based upon the implication that the KCMSD possessed taxation powers once the district court ordered the removal of the state law limitations. This argument proceeds from the notion that limitations on the school district's taxation powers may be severed from the grant of tax power. *See id. But see* Brocker, *supra* note 1, at 758–59 (arguing that it was not possible for the district court in *Jenkins* to enjoin the state law limiting the KCMSD's power to levy a property tax without also enjoining the grant of power that authorized the tax because the state law provision "inextricably coupled the grant and limitation of the power to tax").

[884] *See, e.g., Yonkers*, 902 F.2d at 216, 219 (denying intervention to parties whose interests were found adequately represented in a proceeding in which the district court had ordered that park land be rededicated for use as a public school site and stating in dicta that a federal district court may order the suspension of state law to remedy constitutional violations); *Missouri*, 515 F.2d at 1372 (quoting *North Carolina State Board of Education v. Swann*'s statement that a state imposed limitation "must give way when it operates to hinder vindication of federal constitutional guarantees").

[885] *See generally* Liddell v. Missouri (Liddell VII), 731 F.2d 1294 (8th Cir. 1984); *Missouri*, 515 F.2d 1365; *Haney*, 429 F.2d 364.

[886] Federal courts frequently quote the statement in *Haney* that "[t]he remedial power of the federal courts under the Fourteenth Amendment is not limited by state law." *See Haney*, 429 F.2d at 36. *See also, e.g., Liddell VII*, 731 F.2d at 1321; Hoots v. Pennsylvania, 672 F.2d 1124, 1131–32 (3d Cir. 1982) (quoting *Haney* and stating that although the district court modeled its order to conform with Pennsylvania statutory provisions, the statute was not binding on the district court); *Missouri*, 515 F.2d at 1372; Taylor v. Coahoma County Sch. Dist., 330 F. Supp. 174, 183 (N.D. Miss. 1970); *see also* Bradley v. School Bd., 338 F. Supp. 67, 108 (E.D. Va. 1972) in which the court stated the following:

> Appellees' assertion that the District Court for the District of Arkansas is bound to adhere to Arkansas law, unless the state law violates some provision of the Constitution, is not constitutionally sound where the operation of the state law in question fails to provide the constitutional guarantee of a non-racial unitary school system. The remedial power of the federal courts under the Fourteenth Amendment is not limited by state law.

Id. at 108.

facts in *Haney* reveals that the federal judiciary made every attempt to comply with state law while exercising its remedial powers. The plaintiffs, in a school desegregation case, proposed to create a new unitary school district by consolidating two school districts. Instead, the court ordered the annexation of one school district by the other, apparently on the basis that state law required the annexation of all school districts lacking an "A" rating by June 1, 1979.[887] The plaintiffs argued that the district court erred in its assumption that it was bound by Arkansas law.[888] The Eighth Circuit agreed with the plaintiffs that the district court was not bound by Arkansas law in overseeing the implementation of a school desegregation plan,[889] but it found that the district court did not err "in ordering the larger more populous former white school district to annex the smaller less populous former black school district if that annexation [did] in fact accomplish a unitary nonracial school system."[890] The Eighth Circuit then

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[887] *See Haney*, 429 F.2d at 367–68.

[888] *See id.* at 368.

[889] *See id.*

[890] *See id.* at 369. In *Bradley v. School Board*, the district court interpreted *Haney* as follows:

> In *Haney*, the merger of state school districts, as a form of possible remedy, was approved despite that it might in certain respects require the violation of state statutes whose constitutionality was not questioned. A single district judge decided that case, and appeal was taken to the court of appeals, where no jurisdictional question was raised.
>
> Such orders as were approved in *Haney* are not such as can only be entered by a three-judge court for the reason that no one is thereby ordered to disobey a state law on account of its unconstitutionality. The question of the law's validity never arises; its disregard is directed as a matter of remedy alone, in order to undo the effects of proved unconstitutionally discriminatory acts. A single judge can enter such an order.

Bradley, 324 F. Supp. 396, 400–01 (E.D. Va. 1971).

In *Jenkins v. Township of Morris School District*, the Supreme Court of New Jersey discussed *Haney* as follows:

> In *Haney v. County Board of Education of Sevier County, Ark.*, the court of appeals flatly rejected a district court's notion that consolidation to eliminate segregation in the public schools may not be achieved without the voter approval contemplated by state law. In the course of his opinion, Judge Lay noted that 'state political subdivisions have long ago lost their mastery over the more desired effect of protecting the equal rights of all citizens'; he pointed out that political subdivisions of the state are 'mere lines of convenience for exercising divided governmental responsibilities' and 'cannot serve to deny federal rights'; he stressed that equal protection rights do not depend on the votes of the majority; and in response to those who still persist in their opposition to integration, he had this to say:
>
> > Separatism of either white or black children in public schools thrives only upon continued mistrust of one race by another. It reflects a continuum of the fallacious 'separate but equal' doctrine, which the law now acknowledges

proceeded to modify the district court's order regarding the composition of the new school district board in order to follow the governance structure established by Arkansas law.[891]

Likewise, in *Liddell VII,* the Eighth Circuit Court of Appeals prodded the district court to exercise restraint before setting aside state law limitations. The district court had entered an order that authorized and directed the St. Louis Board of Education not to reduce its operating levy as required by Proposition C.[892] The district court thus overrode a tax cutting measure, as in *Jenkins*. On appeal, the Eighth Circuit struck down the district court's order to ignore Proposition C because the district court made no factual finding that "all other fiscal alternatives were unavailable or insufficient."[893] In addition, the Eighth Circuit Court of Appeals held that state law could not be bypassed without an evidentiary hearing providing factual findings that (1) the district court determined both the short and the long-term monetary amount required to fund the desegregation order and assessed the school district's ability to fund the order with its own resources, (2) the district court considered alternative resources, such as submissions to voter referenda or new state legislative authorizations to impose other taxes, if the school district lacked adequate resources to fund the desegregation order, and (3) the voters or the state legislature failed to authorize new funding sources.[894]

In *United States v. Missouri*, a decision cited in *Liddell VII*,[895] the Eighth Circuit also refused to uphold a district court order that overrode a tax cap. The

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> serves only as a sleeping sickness, whether it be engendered by the white or black. Separatism is just as offensive to the law when fostered by the Negro community as when the white community encourages it. Perpetuation of a bi-racial school system moves only toward further intolerances and misunderstandings. The law can never afford to bend in this direction again. The Constitution of the United States recognizes that *every* individual, white or black, is considered equal before the law.

Jenkins v. Township of Morris School District, 279 A.2d 619, 628 (N.J. 1971) (emphasis in the original) (citations omitted).

[891] In lieu of retaining existing board members from the two school districts, as the district court had ordered, the Court of Appeals instructed the district court to order a popular election to obtain district-wide voter participation in the election of a new board for the newly created district since Arkansas law called for elected school boards exercising general governmental powers. *See Haney*, 429 F.2d at 369.

[892] *See* MO. REV. STAT. § 164.013 (Supp. 1999) (Proposition C) (requiring school districts to reduce property taxes in an amount equal to 50% of the previous year's sales tax receipts in the district). *See* Liddell v. Board of Educ., 567 F. Supp. 1037, 1056 (E.D. Mo. 1983) (ordering the board of education not to reduce its operating levy as required by Proposition C). The court ordered that the revenue retained by noncompliance with Proposition C's roll back be used to fund the desegregation remedial plan. *See id.*

[893] Liddell v. Board of Educ. (Liddell VII), 731 F.2d 1294, 1323 (8th Cir. 1984).

[894] *See id.* at 1323.

[895] *See id.* at 1320.

district court ordered the annexation of two school districts to a third school district. It then ordered the establishment of a uniform school tax rate throughout the new district, fixed at a maximum rate exceeding the rate in effect in all three of the districts at issue.[896] The district court found no reasonable possibility existed that the requisite number of voters would approve the taxation rate the court deemed necessary to fund the desegregation plan.[897] Two of the school districts attacked the imposition of a tax levy without the popular vote Missouri's Constitution required.[898] On appeal, the Eighth Circuit, while affirming its broad remedial powers, reversed the district court's tax rate ruling. Seeking to comply with state law, the Eighth Circuit held that the tax rate should be set at the maximum rate of the annexing district.[899] The appellate court opinion referred to several Missouri Attorney General opinions concluding that "when one school district annexes another, the voter-approved levy of the annexing district applie[s] to the annexed territory."[900] So even the Eighth Circuit, with the exception of its aberrational decision in *Jenkins*, did not set aside fiscal state law limitations, albeit proclaiming its power to do so in the event it found insufficient remedial funding for a school desegregation plan under existing state law.

3. Jenkins *Not Viewed as Precedential Support to Override State Law Limitations*

Several federal courts have chosen a rather confined reading of the impact that *Jenkins* should have on overriding state law limitations relating to taxation. In *Berry v. Alameda Board of Supervisors*,[901] indigent plaintiffs attacked a state constitutional limitation on real property taxation, commonly known as "Proposition 13," claiming it violated their due process and equal protection rights because it limited the amount of medical benefits to which they were entitled under California statutes. Finding no violation of clearly defined federal constitutional rights, the district court declined to apply *Jenkins*.[902] In fact, the

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[896] *See* United States v. Missouri, 515 F.2d 1365, 1371 (8th Cir. 1975).

[897] *See id.* at 1371–72.

[898] *See id.* at 1372.

[899] *See id.* at 1373.

[900] *Id.* at 1373 n.8.

[901] 753 F. Supp. 1508 (N.D. Cal. 1990).

[902] *See id.* at 1512–14. The California statutes and the Fourteenth Amendment did not preclude all disparities in grants of welfare benefits. *See id.* Further, the court suggested that the remedial process found necessary to remedy school desegregation plans might not be appropriate to remedy other constitutional violations, stating that "school desegregation cases pose unique settings for the application of equitable principles." *Id.* at 1513. *Berry* thus suggests that overriding state tax limits for federal court remedial purposes should have limited applicability except in the implementation of school desegregation remedies. *See id.* at 1513–14.

district court referred to the principle of comity, a reference rarely found in school desegregation opinions, as a restraint upon the exercise of jurisdiction over the plaintiffs' claims.[903]

In *Little Rock School District v. Pulaski County Special School District*, which was reversed later on other grounds, the district court opined that *Jenkins* sanctioned a judicial taxation order only when the locality ordered to tax possessed some authority to tax.[904] The district court explicitly stated that *Jenkins* could not be read to authorize court-ordered taxation by a locality without taxing authority under state law.[905]

CONCLUSION

The struggle to remedy racial discrimination has taken many twists and turns since the Supreme Court's landmark decision in *Brown I* in 1954. Public opposition to busing caused the courts, beginning in the 1970s, to employ incentives, such as the creation of quality improvement programs and magnet schools, to further integration in the nation's public schools. The courts' remedial goals focused on providing higher quality education and achieving greater racial balance in schools with substantial minority enrollments due to residential segregation. The United States Supreme Court's approval, in *Milliken II*, of these court-ordered, quality-educational remedial measures, involving intrusive judicial oversight, ushered in an era of expanded judicial power to reform state and local educational programs and facilities.

The large cost of implementing *Milliken II*-type remedies broadened the scope of the federal judiciary's fiscal remedial power. When local resources proved deficient to meet the expense of the desegregation remedial plans, the courts turned to the states' budgets for added financial support. The highly publicized *Jenkins v. Missouri* school desegregation litigation in Kansas City, Missouri illustrates this expansion of the federal judiciary's equitable powers to reallocate state and local resources. Rather than rely upon existing funding levels, District Court Judge Russell G. Clark went one step further—he ordered school district taxation and set aside Missouri's legally created and generally applicable limitations upon tax levy amounts to augment the district's fiscal resources.

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[903] *See id.* at 1515. The district court cited *Fair Assessment in Real Estate Association v. McNary* as precedent for the exercise of equitable restraint in suits challenging the constitutionality of state tax laws. *See Berry*, 753 F. Supp. at 1514–15; *see also* Colonial Pipeline Co. v. Collins, 921 F.2d 1237, 1243 (11th Cir. 1991) (noting the policy of equitable restraint derived from principles of comity and construing *Jenkins* as precedent for "only a circumscribed power to interfere with a state's taxation system in order to remedy constitutional violations").

[904] *See* 778 F. Supp. 1013, 1018 (E.D. Ark. 1991), *rev'd on other grounds*, 971 F.2d 160 (8th Cir. 1992). For a discussion of *Little Rock*, see *supra* notes 831–41 and accompanying text.

[905] *See id.*

In its 1990 *Jenkins* decision, the United States Supreme Court upheld the district court's taxation orders and removal of state law limitations impeding such taxation. The Court only stipulated that once ordered, the taxation should be undertaken by the local school district, not by the district court itself. Judicial assumption of taxation powers clashes with the Court's more recent pronouncements in *Alden v. Maine*, *Printz v. United States*, and *New York v. United States* that confirm the existence of outer limits derived from the Constitution's federal structure upon Congress's Commerce Clause power. In these rulings, the Court railed against congressional commandeering of the states to implement federal regulatory programs and stressed the need to maintain the balance imposed by the Constitution's structure of shared power between the states and federal government. Surely, the Court must believe that postulates derived from the Constitution's federalist structure bear upon the judiciary as well as upon Congress and the President.

The widespread fiscal remedial power upheld in *Jenkins* violates the Constitution's structure of vertical and horizontal powers. The Constitution does not vest the power of taxation in the judiciary; instead, this power is lodged in the legislative branch. Judicial taxation further defies notions of comity and federalism, well established by the Court's precedent, that caution against overly intrusive remedial measures in the sensitive areas of state-federal relations. The Court's rulings consistently stress the necessity to treat the administration of a state's taxation system with respect because taxation constitutes a core state function essential to the states' separate existence. This Article further argues that *Jenkins*'s approval of judicial taxation violates the Constitution's Guarantee Clause by undermining the Constitution's guarantee of state republican rule, a form of government that derives its powers from the people. When the unelected federal judiciary orders state or local taxation, unauthorized by the state legislature, the citizenry is deprived of representation by their elected officials. Taxation and the allocation of fiscal resources are among the fundamental governmental powers that reside in the people's elected representatives—a principle inviolate since the framing of the Constitution.

In *Jenkins*, the Court did acknowledge that a tax increase ordered by a federal court constitutes an extraordinary remedy and should be imposed only after the district court determines that permissible alternatives are not available to effectuate the remedial plan. This Article criticizes the "no alternative" test as difficult to apply because it invites disagreement about the practicality and availability of alternative methods to fund a court-ordered remedial plan underway. After the formulation of a plan, alternative financing mechanisms that produce less revenue than originally contemplated by the court's orders undermine the judiciary's credibility and upset plaintiffs' expectations.

At the outset of school desegregation or institutional reform litigation, the district court should carefully examine the financial impact of the remedial plan as well as the steps deemed necessary to correct the constitutional violations. The

scope of the plan should be achievable within ordinary, not extraordinary, state fiscal conditions. When a district court's remedial plan substantially implicates the public treasury, the court should consider the local and state interests affected by the plan as well as the violated constitutional rights. The district court should follow the balancing test established in *Milliken II* that calls for a consideration of state and local interests in the remedial process as well as an examination of the nature and extent of the constitutional violation and the need to remedy the constitutional violation to the extent possible.

A standard calling for a more stringent series of findings prior to the issuance of any tax orders should replace the unworkable no alternative test. Judicial taxation should be imposed only in the most extreme of circumstances—when alternative funding sources have been repeatedly denied and the taxation deficiencies cause the constitutional violations to be plainly remediless. Because court-ordered taxation unauthorized by state law deeply intrudes upon state autonomy and transforms the judiciary into a state legislature, the Court should refrain from it.